JD–81-21
Darien, CT

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

MICHELL ENTERPRISES, LLC
D/B/A MCDONALD'S

and **Case No. 01-CA-261495**

SERVICE EMPLOYEES INTERNATIONAL
UNION, LOCAL 32BJ

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for the General Counsel.
***Kevin J. Greene, Esq.* and *Duncan J. Forsyth, Esq.*,**
for the Respondent.
***Jessica D. Ochs, Esq.*,**
for the Charging Party.

DECISION

STATEMENT OF THE CASE

DONNA N. DAWSON, Administrative Law Judge. The hearing occurred virtually with Zoom for Government technology on December 16, 2020, and January 11–14, 21–22, and 28–29, 2021, due to the compelling circumstances created by the Coronavirus (COVID-19) pandemic. The Service Employees International Union (SEIU), Local 32BJ (the Union/Local 32BJ) filed the underlying charge on June 10, 2020,[1] and the General Counsel issued the complaint on October 14, 2020. The complaint alleges that since May 2020, Respondent violated Section 8(a)(1) and (3) of the Act by failing and refusing to recall or rehire from lay off four of its employees (Discriminatees) because of their protected activity.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

Michell Enterprises, LLC d/b/a McDonald's (Respondent/the Company), a corporation, does business operating restaurants located along Interstate 95 Northbound in Darien,

[1] All dates are in 2020 unless otherwise indicated.

Connecticut, one of which is its Darien North McDonald's store (DN store). It annually derives revenues in excess of $500,000 and purchases and receives goods valued in excess of $50,000 directly from points located outside the State of Connecticut. The parties admit, and I find, that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The parties also admit, and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.[2]

II. ALLEGED UNFAIR LABOR PRACTICES

A. Introduction

The facts of this case are set against the backdrop of the onset and continuation of the COVID-19 pandemic and its negative economic effect on fast food and other service industries. The record evidence shows that in the year prior to the hearing in this case, temporary store closures, orders to stay-at-home, and other restrictions caused a decrease in turnpike traffic and consequently sales at Respondent's Interstate 95 (I-95) McDonald's stores located in Fairfax County, Connecticut. As a result, in March 2020, Respondent laid off many of its employees in the DN store, as well as two of its nearby stores along that corridor, Fairfield McDonald's (Fairfield) and Darien South (DS).[3] Central to this case is Respondent's treatment of certain of its employees (the discriminatees in this case) at the DN McDonald's store in the midst of layoffs and subsequent rehires during the early stages of the pandemic.

More specifically, the record shows that Respondent either attempted to recall or recalled most of its DN employees in May 2020 with the exception, however, of the four discriminatees. The record further reveals that all four discriminatees openly participated in a union organizing campaign that began in 2019. The General Counsel alleges that Respondent failed to reinstate the discriminatees because their level of engagement in protected activity far exceeded that of other DN employees. Respondent, on the other hand, insists that its recall actions were legitimate pandemic related business decisions.

B. Respondent's Business Operations

1. Generally

Respondent is a McDonald's Corporation franchisee that subcontracts the DN, DS, and Fairfield service plaza locations from Project Services LLC. Project Services contracts with the State of Connecticut to operate the service plazas along I-95. (Tr. 79–80, 705.) Of all the three

[2] During trial, Respondent stipulated that the Union is a labor organization within the meaning of the Act.

[3] Respondent's Darien North and Darien South McDonald's stores were also referred to as Darien East and Darien West, respectively. In this decision, they will be referenced as DN (North) and DS (South). The DS store is located across from DN on I-95 southbound and the Fairfield store is located further south on I-95. (Tr. 320, 670, 679.) Evidence concerning similar layoffs and rehires at the DS and Fairfield stores is relevant for background purposes.

I-95 turnpike stores referenced in this case, DN has the largest number of sales and employees. (Tr. 895, 1046–1047.) Respondent's corporate offices are located in Windsor Locks, Connecticut.

The management officials involved in this case include George Michell (Michell), owner/operator of Respondent Michell Enterprises, LLC d/b/a McDonald's; Linda Cukurs (Cukurs), chief financial officer and custodian of records; Tyrone Davis (Davis), senior director of operations; Nedia Encarnacao (Encarnacao), operations manager; Carlos Arellano (Arellano), area operations supervisor; and Lila Aguirre (Aguirre), DN store manager.[4]

George Michell owns and operates at least 20 McDonald's restaurants, including the three turnpike stores (DN, DS and Fairfield). (Tr. 627, 871, 914, 935.) According to Cukurs, George Michell does not engage in the day-to-day operations of his stores. Instead, he hires people to run his restaurants and interfaces with McDonald's Corporation and other entities such as the McDonald's foundation. Respondent leases/subcontracts its three McDonald's stores discussed in this decision from Project Service, LLCs' operator of travel plazas along I-95 north and south. Each store, including DN, is situated within these travel plazas in an open food court type of layout.

Cukurs oversees Respondent's administrative functions including, but not limited to, payroll, insurance, financial and tax reporting, and customer service. She supervises a staff of about 12 direct reports, including April Hernandez who oversees payroll. Cukurs and her staff work out of Respondent's headquarters in Windsor Locks. Cukurs reports directly to George Michell. Davis, who also reports to Michell, directs operations of Respondent's McDonald's stores in Connecticut and in turn manages Encarnacao who oversees operations for the DN, DS, and Fairfield McDonald's stores. Arellano reports to Encarnacao and supervisors Respondent's store managers including DN store manager Aguirre. Encarnacao is responsible for business operations for over 1000 McDonald's employees in Respondent owned and other Franchisee owned stores, including the three turnpike stores. In addition to those three stores, Arellano oversees operations in about five other stores. (Tr. 679, 738, 918–919, 924–925.) All operations managers are responsible for assuring that labor cost targets set annually by Michell are met.

2. Respondent's McDonald's store employees' duties

Respondent's McDonald's store managers run the day-to-day operations and manage department and shift managers. The evidence reflects that department and shift managers are both referred to as shift managers who are responsible for the various areas of the store such as the kitchen/food preparation, front counter, and drive-through (drive-thru) window service. They also supervise the nonmanagerial employees referred to as crew members and trainers. Crew members prepare food, make sure the store is clean and serve customers at the front counter and

[4] In its answer, Respondent denied that Linda Cukurs was a supervisor as defined in Sec. 2(11) of the Act but provided no evidence to the contrary. In addition, I granted, without objection, the General Counsel's motion to amend the complaint to add Michell and Davis as supervisors and agents under the Act. Therefore, I find that the foregoing management officials are supervisors and agents with the meaning of Sec. 2(11) and (13) of the Act. Except for Michell and Davis, these officials testified during the hearing.

drive-thru window.[5] Crew members may be promoted to crew trainers once they become proficient with their duties. The store manager typically schedules crew members to their regular shifts and to various areas within the stores. However, crew members and shift managers may be assigned to other shifts, areas in the store and duties as needed.

3. Darien North (DN) McDonald's store

Encarnacao directs staffing, layoffs, and discipline of employees in Respondent's stores, including the DN store. This includes, if necessary, which employees to lay off and which ones potentially to rehire or bring back.[6] She explained that due to her "tight" schedule, she visits about four stores in 1 day and is in the DN store about once a week. Upon arrival, she routinely goes through the drive-thru windows and then enters the stores to report her experiences and provide instruction and recommendations to the store managers regarding store operations. (Tr. 914–915.) She claimed to have little interaction or specific knowledge of employees in these stores or their involvement in union activity. Arellano as area supervisor visits the McDonald's stores more frequently and makes sure the stores are profitable. In this capacity, he manages the "controllables" such as labor, food costs, financials, QS&C (quality service and cleanliness). (Tr. 918.) He is responsible for 8 stores including DN and testified that since he is constantly in and out of the McDonald's stores every day, he does not need an office. (Tr. 1057.) As the general manager of the DN store, Aguirre manages restaurant employees in all areas such as hiring/staffing, scheduling, and assignments to the various areas and functions in the store. In doing so, she ensures that labor costs, product quality control and customer service goals are met. She is also responsible for "performance indicators" such as the labor cost targets and supervises department and shift managers delegating to them day-to-day kitchen, front counter, drive-thru, and maintenance oversight duties. Aguirre also makes up the weekly and daily schedules and specific assignments for managers and crew members. (Tr. 919–920.)

C. The Discriminatees

Prior to the March layoffs, Discriminatees Mario Franco (Mario), Rosa Franco (Rosa), Pilar Mestanza (Mestanza), and Milagro Vasquez (Vasquez), collectively worked for Respondent over 75 years.[7] Mario, an overnight (ONS) department/kitchen manager, had worked over 25 years and Rosa, an ONS shift manager worked about 15 years. As full-time managers overseeing crew members on the ONS shift (12 a.m. to 8 a.m.), they monitored food quality including checking temperatures, quantity and preparation, all aspects of customer service, and store cleanliness and maintenance. In addition to their managerial duties, they interacted with and served customers at the front counter and drive-thru through window and assisted crew employees with kitchen and food preparation, cleaning, and maintenance. Mario, as designated kitchen manager, focused his attention on the kitchen and food preparation. Both had excellent performance histories at the DN store. (Tr. 1248–1249, 915, 945.) Prior to the layoffs, the ONS

[5] Store and shift managers also perform crew member duties.

[6] As discussed later in this decision, Respondents' witnesses insisted that Encarnacao made all of the pandemic lay-offs and subsequent rehires, central to this case, in the DN, DS, and Fairfield stores.

[7] Since Mario and Rosa Franco (unrelated) share the same last name, they will be referenced by their first names.

crew members had typically included one full-time and one part-time employee who primarily worked in the kitchen.

Mestanza worked for Respondent for almost 29 years. She served as one of Respondent's highest paid department managers at the DN store (but not the highest paid). She mainly worked flexible shifts-afternoons (4 p.m. to midnight) on Mondays and mornings (8 a.m. to 4p.m.) on Wednesdays. On weekends, she was assigned various shifts as needed. Like Mario and Rosa, she had started as a crew member and worked her way up to a management position. Her duties included overseeing the shifts, counting money and making deposits, organizing various promotional materials and ensuring the shift ran smoothly meeting customer service, and quality control goals. She along with Mario were two of the more senior employees at the DN store.

Unlike the other Discriminatees, Vasquez normally worked the afternoon shift (4 p.m. to midnight) as a crew member. Since she had started working for Respondent in about 2015, and several years before that at another McDonald's store, she chose to work only in the kitchen preparing food. This is where she felt most comfortable working, rather than at the front counter or drive-thru interacting with customers.[8] (Tr. 531.)

D. The Pandemic Layoffs

In March 2020, due to the effects on Respondent's McDonald's stores on the I-95 corridor, Respondent laid off employees at all three of its Darien Connecticut stores. On March 23, Arellano met with Rosa and Mario to inform them that the ONS would be eliminated and they would in turn be laid off due to the loss of business. Both Rosa and Mario recalled being told that if or when things got better, they would be called back to work. (Tr. 341–342, 440–441.) According to Encarnacao, after she advised them of the layoffs, Mario said that he "fully

[8] There was dispute as to whether Vasquez preferred not to interact with customers because she did not speak English. Aguirre testified that at one point in time, she had "suggested to [Vasquez] to work up front, but she refused" because at her previous job, her manager "suggested that she never work up front of the store, because she is rude, and she cannot handle stress with the customers." When asked about Vasquez' ability to speak English, Aguirre responded that "I never heard her speak English, during my time working at the store." (Tr. 1144–1145.) Vasquez denied telling Aguirre this story and testified that she had never received or refused a command or directive to work serving customers. Initially, she admitted to refusing a "[proposal]" by Aguirre to work in the front interacting with customers because she "[was] actually comfortable in the kitchen." Vasquez insisted that she speaks English but "[i]t's not perfect." (Tr. 531.) On rebuttal, Vasquez denied testifying that Aguirre had ever suggested that she work outside of the kitchen, stating that Aguirre "always said, in general terms, that everybody. . . had an option to work at the front counter," and that "otherwise [she] would have taken the chance of working the front counter, even without speaking English." (Tr. 1194–1198.) Given Vasquez' inconsistent testimony, I credit Lila's testimony that Vasquez had refused a past opportunity to work serving customers. Nevertheless, there is no evidence that Vasquez' preference to continue working in the kitchen was due to an inability to communicate in English. Nor is there evidence that Vasquez would have refused to work in another area serving customers if given the choice of doing so versus being permanently terminated.

understood." She claimed that when she told him they were going to "put [him] on unemployment…and as soon as things get better, you know, we'll give you a call back," Mario responded that he could not receive unemployment because "[he had] another job" and that [he worked] during the day. . . cleaning a building." She further testified that she emphasized that the ONS "which is what you can work" would be gone. Encarnacao also claimed that it was the "[s]ame thing with Rosa," in other words, Rosa also said that she understood and told Encarnacao that "she has a day job cleaning houses" and would not be applying for unemployment. (Tr. 925–927.)

In early May, Arellano called Rosa to tell her that the ONS shift "had disappeared and there was no more work." Rosa claimed that when she tried to speak and ask questions, Arellano "hung up, he didn't give [her] an opportunity to say anything." Subsequently, Rosa received a letter dated June 12 from CFO Cukurs informing her that,

> Unfortunately, sales volumes at this restaurant continue to be low, and there is very little business on the shift you previously worked. As a result, we have eliminated most of the positions on this shift, as well as reducing the number of managers overall. Your Operations Manager, Nedia Encarnacao, called you to advise you that your position has been eliminated.
>
> I regret to inform you that, at this time, it does not appear that we will be able to re-hire you.

(Tr. 3341–343, GC Exh. 6.)

On June 8, Mario attempted to reach Respondent to ask if he would be rehired. He did not receive a return call until June 12 when Encarnacao called to inform him that he would not be returned to work. (Tr. 441–442.) Mario testified that he asked Encarnacao if there was work available on another shift and she responded, "no, you belong to the night shift." After this call, he received a letter dated June 12 from Cukurs acknowledging that he had called the headquarters office on June 8 and informing him that,

> As a result of the COVID-19 pandemic, sales volumes at this restaurant have been severely reduced" and "[u]nfortunately, sales volumes at this restaurant continue to be low, and there is very little business on the shift you previously worked. As a result, we have eliminated most of the positions on this shift, as well as reducing the number of managers overall.
>
> I regret to inform you that, at this time, it does not appear that we will be able to re-hire you.

(Tr. 441–442; GC Exh. 5.)

On March 28, Encarnacao and Arellano met Mestanza and Vasquez at the DN McDonald's store and advised them that they were also being laid off due to the pandemic. Both

testified that Encarnacao said that they may be called back when business improved. (Tr. 510–511, 585, 1061–1062; GC Exh. 7.) Vasquez testified that she and Mestanza complained that the layoffs were unfair because other employees with less seniority had not been laid off and that Aguirre's brother, Shift Manager Leonel Aguirre (Leonel) and another worker, Delia Escobar (Delia), continued to work 40 hours a week. According to Vazquez, Encarnacao denied that anyone had been working 40 hours a week. (Tr. 512, 586–587.) Encarnacao recalled that Mestanza had responded that she guessed she was "going to have to have rice and beans for the next I don't know when." Encarnacao testified that after being notified, they just "took it in, they said we understand, it's slow and she said that's fine. You know, she didn't make a big deal about it. She just said that's fine." Encarnacao further testified that Vasquez just "said fine." (Tr. 927–928.) By letter dated May 28, Encarnacao documented her telephone call to Mestanza that morning to advise that, "sales volumes are still very low, and we are unable to re-hire you. The position you held is no longer available." Encarnacao also stated that Mestanza could contact her or the payroll office if she had any questions.[9] She did not mention any reduction in managers overall. (GC Exh. 7.) It is implausible that Mestanza would go from lamenting about having to eat rice and beans to being so understanding and "fine" about being laid off. Further, Arellano who was in attendance during the layoff meeting did not corroborate Encarnacao's testimony. In fact, he claimed not to remember much if anything Vasquez and Mestanza had to say. (Tr. 1160–1164.) Therefore, I credit Vasquez' and Mestanza's versions of what was said during the March 28 meeting with Encarnacao and Arellano.

Respondent also laid off other DN employees in March 2020. Twelve of them were crew members and three were shift managers. Two of the crew members worked on the ONS shift with Rosa and Mario (Carmen Portillo-part time and Roxana Rodriguez-full time). In all, Respondent laid off about 19 of its DN employees in March, including the four Discriminatees. According to Encarnacao, she alone made the decisions as to how many and which employees to lay off and ultimately return to work. Encarnacao testified that she, along with Aguirre and Carlos, "made the decision" to keep only one ONS shift employee, crew member Martin Huamani (Martin), on board to work overnight "basically for security reasons because . . . in the Plaza, we don't have any like metal shields that come down that you can actually close the restaurant." She also testified that Huamani "would continue to do maintenance," and "would just do the maintenance on the machines that needed to be done." (Tr. 930, 966.) She gave no explanation as to why she had not offered this opportunity to Vasquez. Although Vasquez had not worked on the ONS, she was a crew member who made $.50 less than Martin. Both Aguirre and Arellano contradicted Encarnacao's (and each other's) testimony. Both denied having any part in the decision to keep Martin on the ONS while Arellano testified that it was Aguirre's decision to keep Martin on. (Tr. 1076.)

Of the other 24 DN store employees who remained active (not laid off) in March, 13 were managers assigned to various shifts: 7 were full-time morning/evening or morning/lunch/evening shift "flexible;" 1 was part-time morning/lunch/evening shift "flexible;" 2 were full-time morning/lunch shift; 1 was full-time morning shift; 1 was part-time morning shift; and 1 was part-time evening shift. One of them, Lorenza Huamani, earned more than Mario and Mestanza. (R. Exh. 10, 13.) The other 11 employees who avoided layoffs were crew members on various shifts: 1 full-time morning shift; 1 full-time ONS shift (Martin Huamani); 3

[9] There is no evidence that Vasquez received a layoff letter from management.

either full-time morning/evening or morning/lunch/evening shift "flexible;" 1 part-time morning shift; 1 part-time lunch shift; 2 part-time evening shift; and 1 part-time evening/ONS shift "flexible" (Carmen Polanco) (Id.)

Encarnacao also laid off a number of employees and suspended the ONS at Respondent's DS and Fairfeld McDonald's stores. (GC Exh. 68.)

E. 2020 Recalls, New Hires, Promotions and Wage Increases

1. Respondent recalls or attempts to recall employees except discriminatees

In May, Encarnacao attempted to rehire all of the laid off DN employees except for the four Discriminatees. She testified that she did so in anticipation that the pandemic would improve along with normally increased summer season sales.[10] Encarnacao testified that she alone made the decision to bring back employees in all three of the turnpike stores without any input from or discussions with her superiors or with Aguirre and Arellano. Arellano and Aguirre also insisted that Encarnacao had not involved them in the decisions regarding the layoffs and subsequent recalls. (Tr. 1095–1097.) She did meet with Arellano to tell him which employees to call and offer a return to work. She insisted that in making these decisions, she only reviewed sales, staffing and operations reports showing dates of hire and layoff and sales and labor percentages for 2020 versus 2019. She acknowledged that these documents did not contain any information regarding employees' availability to work different shifts or in multiple areas of the restaurants. Despite this testimony, Encarnacao claimed that she consulted with and relied on Aguirre for information about employees,' including the discriminatees', availability to return to work. Aguirre on the other hand denied providing any information whatsoever to Encarnacao about employees' ability and availability to work. (Tr. 936, 965, 968, 976–979, 1001–1003.)

In turn, Arellano assisted in making calls (as instructed by Encarnacao) to employees asking them to return to work. In doing so, he created spreadsheets reflecting the results of his efforts.[11] For example, he listed the names of the laid off employees from the DN store and whether he recalled them to work or attempted to do so. The spreadsheet reveals that Arellano either had offered recall or attempted to offer recall to all DN employees listed except for the four Discriminatees. One employee declined to return due to pregnancy (Neika Alexis). He noted that he could not reach three other employees (Carmen Portillo, Jocelyn Gomez, and Roxana Rodriguez) because they either had not answered or had a wrong number on file (Tr. 983, 1024–1027; GC Exhs. 60, 76.) Arellano had also noted that on May 11, he let Rosa know she was no longer needed, did not reach Mario because his phone was disconnected, and made no attempts to call Vasquez or Mestanza. (GC Exh. 76.) Nevertheless, Encarnacao acknowledged that she had already decided not to bring back the discriminatees.

[10] There is no dispute that business was seasonal such that it normally peaked during the summer months (about June-August), decreased somewhat September through November, slowed considerably in the winter months (about December through February) and began to pick up again in March through April.

[11] His spreadsheets reflect that he made his calls between May 11 and 12 and that Respondent added back those who accepted recall to the schedule on about May 18. (GC Exhs. 60, 76.)

Encarnacao testified that she had returned 11 DN store employees to work, offered recall to one who refused due to pregnancy and offered recall to three who could not be reached.[12] Respondent's Exhibits 9 and 13 indicate that Carmen Portillo and Roxana Rodriguez were not rehired or offered rehire. However, Encarnacao, who insisted she made the decision as to which employees to return, agreed when asked "And Carmen Portillo was called on May 11th and May 12th to ask if she would be willing to return to work, correct?" Encarnacao also confirmed that Portillo and Rodriguez were not recalled because they could not be reached. Moreover, as stated, Arellano's spreadsheet at General Counsel Exhibit 76 confirms that he did in fact attempt to reach Portillo and Rodriguez. Thus, I find the evidence supports a finding that the only employees Respondent did not reach out to or attempt to reinstate were Mario, Rosa, Mestanza, and Vasquez. In addition, I find that Respondent never assessed their availability to work at any time before, during or after the March layoffs. (Tr. 1025; GC Exh. 76.)

On re-direct examination, Respondent's counsel attempted to have Encarnacao change her testimony and speculate by asking

Q: "let's say you had called Jocelyn Gomez, let's say she had responded and said, well, yes, I'm going to return, do you know if you still would have called back the same people or if you had said, all right, well Jocelyn's going to return, that means we don't need to offer to, say Margarita Martinez?"

A: Yeah, so that's, you know, based on the amount of people that I needed back in the restaurant that's how the decision was made…so it depended on what we needed.

(Tr. 1043–1044.) In her response, Encarnacao hesitated as she contradicted earlier testimony that she gave Arellano a list of employees to ask to return to work. She never previously testified or indicated (nor did Arellano testify) that she had instructed him to only recall a certain number or to stop calling once a certain number of furloughed employees accepted the offer to return to work. (Tr. 1025; R. Exhs. 7, 13.) The 10 employees scheduled to return to work at DN in May included two morning shift managers (one part-time and one full-time) and one full-time morning/afternoon shift manager; two part-time morning shift crew members; three part-time morning/afternoon shift crew members; and two full-time morning/afternoon shift crew members. (R. Exhs. 7, 13; GC Exh. 76.)

Spreadsheets reflecting Arellano's efforts to reinstate laid off employees at the other two turnpike stores (Fairfield and DS) show that of the 24 furloughed employees, Respondent had offered employment to all but one and put back on the schedule all except three employees. They included a DS morning shift maintenance worker whose position was eliminated and two ONS shift Fairfield employees who either failed to return a call or promised to call back but did not. Respondent returned all of its ONS shift employees to the DS work schedule on May 18

[12] Encarnacao testified that DN store crew member Margarita Martinez never returned to work. However, R. Exh. 10 lists her as a paid employee between March 1 and September 4; GC Exh. 76 provided to the General Counsel by Respondent reflects that she returned to work on May 18; R. Exh. 7 reflects that she was still laid off; and R. Exh. 13 reflects that she was laid off but offered rehire. Since Martinez does not appear on Respondent's DN store work schedules admitted into evidence, I find that she was laid off and received an offer to return to work, but for reasons not revealed did not do so.

(one full-time ONS manager, one full-time crew member and one ONS/afternoon part-time crew member). At Fairfield, Respondent attempted to recall all of its ONS shift which initially included two full and one part-time crew members and two full-time managers. (GC Exh. 60.) Therefore, although Respondent suspended the ONS at all three of its turnpike stores, Respondent reinstated or attempted to reinstate all of its ONS employees at the DS and Fairfield stores. Encarnacao testified that she had made these decisions to essentially absorb the DS and Fairfield ONS employees into other shifts while not bringing back any of the laid off DN ONS because the DN store, with a larger sales and transaction volume, took a greater economic hit than the others. I find it implausible that it made good economic sense to return all ONS employees to the smaller DS and Fairfield stores, even given the alleged losses at the DN store.

2. Summer 2020 new hires

In addition to recalling most of its laid off employees in anticipation of higher summer sales volumes, Respondent began accessing, as early as April, employment applications for crew members for the DN store through its online automated employment system, McHire. This McHire system automatically receives applications for various positions within McDonald's stores on a continuous or rolling basis; this occurs whether or not Respondent requests or seeks them. There is dispute as to whether Respondent actually posted job vacancies and/or sought new hires. However, the evidence reveals that DN managers, usually store manager Aguirre and/or DN manager Alejandra Rios Atehortua accessed the McHire system and viewed and reviewed numerous applications between April and the end of June 2020.[13] Nevertheless, there is no dispute that in late May and early June, Respondent hired three new crew members to work at the DN store. In addition, another applicant, Alexandra Bermeo, declined a crew member position offered to her on June 11.[14] ((Tr. 1121–1223; GC Exh. 72), Applicant Alexandra Bermeo) Thus, there is no doubt that DN managers solicited applicants for these positions. (Tr. 1050.) Two of the three new hires, Yessenia Estrada and Jessi Fajardo, began working on May 29 at $14.30 per hour- $.30 more than former crew member Vasquez at the time of her layoff. On June 11, the third new crew member, Tomasa Aquino, began working at the same hourly rate. (Tr. 653–654; GC Exh. 57.) DN management assigned Aquino to work the grill for about the first three months of her employment. Subsequently, she was occasionally assigned to work other areas of the store including the drive-thru. (GC Exhs. 62, 73.) (GC Exh. 72, p. 343.) According to Aguirre, Encarnacao laid off both Aquino and Estrada at the same time. Although she could not recall when they were let go, they were still on the schedule as of December 6, 2020. (Tr. 1151–1154; Tr. 77, pp. 48–49.) Respondent did not hire any new employees at the

[13] Counsels for the General Counsel and Respondent argued over whether GC Exh. 72 actually indicated an applicants' status in the McHire system as having had an interview. The record speaks for itself in that some of the applications show "Interview Complete," while others show "Invite to Interview" or "Interview Pending." Nevertheless, GC Exh. 72 shows that DN store manager, Aguirre, and manager Atehortua, screened many applications, offered and scheduled interviews for some of the applicants and completed interviews for some as early as April through the end of June.

[14] The record shows that DN managers offered Bermeo a crew member position on June 11, after they hired Estrada, Fajardo and Tomasa. Both Atehortua and Aguirre viewed her application in the McHire system and on June 11, Aguirre offered her a crew member position. (Tr. 1222–1223; GC Exh. 72)

DS or Fairfield stores which according to Encarnacao were not as significantly impacted by the effects of the pandemic. (Tr. 677.)

Arellano denied that Aquino only worked in the kitchen the first two months of her employment. (Tr. 1083, 1085.) However, the schedules reveal that she was assigned to the grill from June 11 until approximately September 20. (GC Exhs. 62, 73.) Arellano and Aguirre insisted that the schedules are computer generated only "for guidance of the shift manager," but that the managers assign employees to different areas as needed at any particular time. However, I find it unbelievable that managers have no control over the daily schedules before they are printed out on the computer. Further, notations made by shift managers or Aguirre changing shifts or hours or reflecting changes due to employees calling out sick appear on many of the daily schedules. There were no changes made to Aquino's assignments.[15] Although Aquino eventually worked outside of the kitchen, the daily schedules reflect that at least two other crew members (one not laid off in March, Betty Caban, and one laid off and reinstated in May, Ana Solis, were only assigned to the kitchen/grill area. In other words, like Discriminatee Vasquez, they did not work outside the kitchen. (Tr. 1085–1086; GC Exh. 62, 73.)

3. 2020 Post-layoff raises and promotions at DN

a. Implementation and effects of the Connecticut Standard Wage Law

On August 28, 2019, the Union sponsored a large rally involving Connecticut service plaza food service workers. They protested Respondent's and other Connecticut fast food restaurant owners' failure to pay fair wages under the Connecticut Standard Wage Law. As promised, the Union filed a complaint against owners, including Respondent, alleging they had been violating the law by underpaying food service workers by millions of dollars. (Tr. 74–75; GC Exhs. 9(a), 9(b), 14.) The State's standard wage law provides for a 30 percent cash fringe benefit (cash benefit) added to the State's minimum wage for service and fast food employees who work on state owned properties, including the I-95 corridor service plazas operated by Project Services LLC and subcontracted to businesses located in the DN, DS and Fairfield locations. (Tr. 76, 218.) A subsequent audit by the DOL of Respondent's service plaza operations including the DN store resulted in a 2020 finding that Respondent (and other service plaza owners) had violated the State's Standard Wage Law and owed employees in its turnpike stores back pay and interest for about $870,000.

Therefore, on May 11, 2020, Respondent began compensating its employees pursuant to the Connecticut Standard Wage Law by using the then current hourly wage and adding the hourly cash fringe benefit (cash benefit). (GC Exh. 57.) To comply with state guidelines, Respondent classified crew members as "fast food workers" and all shift and department managers as "fast food leaders." At that time, Respondent knew that in conjunction with the Connecticut minimum wage the standard wage was next scheduled to increase on September 1. Cukurs testified that employees who were already making in excess of the standard wage would

[15] Respondent's counsel would not stipulate that the daily schedules reflect where employees were assigned; however, Respondent provided these schedules in response to the General Counsel's subpoena asking for documentation of when Aquino was assigned outside of the kitchen. It is inconceivable that none of the schedules, duties or assignments were accurate.

not have received an increase. To reach this result, she explained how Respondent lowered employees' base pay to an amount such that when the new standard wage increase was applied, they would end up with the same base wage rate. Thus, the evidence reflects that in May Respondent lowered the base pay of all of its fast food workers (i.e., crew members) before adding the then current cash fringe benefit of $3.30. Respondent repeated this strategy as of September 1 adding a $3.60 cash fringe after adjusting the base pay rates. In applying this formula to all of the managers, Respondent lowered their base wage rates before adding the $3.45 cash benefit in May and the $3.75 cash benefit in September.[16] (GC Exh. 57.)

Using the highest paid manager at the time of the layoffs, DN shift manager Lorenza Huamani (Lorenza), as an example, Cukurs testified that on May 11, she lowered Lorenza's base pay rate from $17 to $13.55 and then added the cash fringe of $3.45 which brought her total pay rate back to $17. Similarly, when on September 1, Cukurs lowered Lorenza's base rate from $13.55 to $13.25 and added the $3.75 mandated cash benefit, Lorenza's total pay rate remained at $17. (Tr. 658, 709–711, 875–876; GC Exh. 57; R. Exh. 10.) Otherwise, this strategy resulted in employees maintaining the same or nearly the same total hourly wages in May. In September, with the exception of Lorenza, all of the managers received a total hourly wage increase (including the $3.75 cash benefit) to $16.25.[17] Based on Respondent's method of incorporating the Connecticut standard hourly and cash benefit increases in May and September, Mestanza's and Mario's total hourly wage rate in May and September would have remained at $16.50 had they been reinstated. Therefore, Mestanza and Mario would have made $.50 an hour less than Lorenza and only $.25 an hour more than all of the other managers. Similarly, had Rosa been recalled, her total hourly wage rate in May would have remained at $15.50 (the same as in March). It would have increased to $16.25 as did all managers who were making $15.50 in March and May. (GC Exh. 57; R. Exh. 10.) Using Ana Solis and the other crew members who made the same hourly rate of $14.00 at the time of the March lay-offs, Vasquez would have received a standard wage increase to $14.30 in May and to $15.60 in September. (Id.) (GC Exh. 57.)

Although not to 2019 levels, Respondent's sales and transactions did pick up in the Summer of 2020. As a result, Respondent increased the hours of its existing employees, including some of its part-time employees. (GC Exh. 69.) In addition to the standard wage rate increases with the cash fringe benefit to all employees in May, Respondent doled out company raises in conjunction with promotions to five crew members in July.[18] Respondent increased the hourly wages of Delia Escobar, Andrea Hernandez, Neica Lafleur, and Elma Vasquez from $14.30 to $14.95. David Martinez received an hourly wage increase from $14.50 to $14.95. In doing so, Respondent added to the increased hourly wage rates the cash fringe benefit of $3.45, the benefit that only managers had received in May. Similarly, in September, they received the

[16] Jt. Exh. 1 reflects the Connecticut DOL's standard wage rates for fast food workers and shift leaders. It reflects the hourly pay and benefit rates applied by Respondent in May 2020 (at the October 1, 2109 rates) and those applied by Respondent on September 1, 2020.

[17] Lorenza had the highest total hourly wage rate ($17) of all the managers at the time of the lay-offs. (GC Exh. 57; R. Exh. 10.)

[18] In July 2020, after the standard wage rate increase in May, Respondent gave performance review company raises to then crew members Delia Escobar, Andrea Hernandez, Neica Lafleur, David Martinez, and Elma Vasquez. (GC Exh. 57, pp. 194, 198, 199, 200, 207; R. Exh. 10.)

same cash benefit of $3.75 bringing them up to the same total hourly wage of $16.25 as all other mangers except Lorenza. Thus, raising their total hourly wage rate to $16.25. Their cash fringe benefits constituted a clear departure from the crew member/fast food worker benefit of $3.30 they received in May. (GC Exh. 57, pp. 194, 198, 199, 200, 207; R. Exh. 10.) Respondent's witnesses disputed the evidence that these individuals or that any crew members were promoted after January 2020. They attempted to explain that the five individuals were trainers or in training and not managers. However, Respondent's own records as discussed above in addition to other exhibits list all five as either "CERT. SWING [MANAGERS]" OR "Managers." (GC Exhs. 57, 80, 83; R. Exhs. 10, 13.)

When cross referenced, both the weekly schedule reports and daily crew schedules both list shift managers first alphabetically by their first names. This format is consistent throughout all of these scheduled provided by Respondent to the General Counsel. (R. Exh. 10; GC Exh. 80–83.) Moreover, DN store pay increases from March through November 2020 show that both Delia and Hernandez received the same base pay as the other shift managers, categorized as stated above for the Connecticut standard wage law purposes as fast food leaders, as of September 1. (GC Exh. 57.) In fact, the evidence shows that Delia and Hernandez not only became managers after the layoffs but at the time of the hearing made more than Rosa when she was laid off and only $.25 less than Mario and Mestanza at the time they were laid off. Further, Aguirre assigned work to these individuals such as counting and depositing cash and even working alone ONS with only a crew member. The evidence shows Respondent normally assigned these duties to supervisors and not crew members or trainers. For example the daily schedule reports indicate the hours and duties assigned to shift managers and crew members. I discount testimony that the schedules provided via subpoena by Respondent were never accurate. It is understandable that employees in a fast food restaurant are moved around as needed on a day-to-day basis, and if this was a one off, I might believe Respondent's witnesses. However, it is incredible that schedules are never accurate or abided by, that schedules never reflect an employee's current position and that Aguirre inaccurately assigned crew trainers such as Delia to duties normally delegated to supervisors or managers. Therefore, I find that Respondent's assertion that no one was promoted after March is unsupported and patently false. Instead, in the midst of the pandemic and financial downturn, Respondent not only brought back all of its laid off employees except Mario, Rosa, Mestanza and Vasquez, but hired three new employees (and attempted to hire four) and gave raises and promotions to five crew members.

4. October 2020- Respondent reopens its overnight shifts

On October 5, Respondent reopened its overnight food service at its turnpike stores albeit with a limited menu and fewer employees at the DN store.[19] (Tr. 931, 943–944.) It also restructured the hours by having a shift manager and crew member work from about 8 or 9 p.m. to about 3 to 4 a.m. and having another employee work from about 4 a.m. to 10 a.m. or 12 p.m. (Tr. 861–862; GC Exh. 73.) Instead of recalling former ONS employees, and retuning to pre-pandemic staffing of two managers and two or three crew members, Respondent kept on Martin who resumed his grill duties and rotated in a manager from one of the other shifts. Aguirre often assigned Leonel as ONS manager and several crew members from other shifts such as Betty

[19] The 24-hour breakfast was eliminated and the other menus were reduced. (Tr. 1157.)

Caban, Consuela Punto, Ana Solis, Jessie Fajardo or Maria Esperanza to cover for Huamani on his days off.[20] (Tr. 1155–1158, 165–166; GC Exhs. 73, 78, 79.)

Despite continued lower sales in all of the turnpike stores, Respondent brought back (or attempted to) all of its DS and Fairfield ONS crew and shift managers in May long before it reopened the ONS.

F. Union Organizing Campaign at Respondent's Stores Takes Off in 2019

1. Generally

In late 2018, the Union reached out to DN employees to initiate a campaign to organize Respondent's McDonald's employees in its I-95 corridor stores. Union organizing coordinator, Neil Diaz (Diaz) sent a group of organizers to meet with and survey employees about their terms and conditions of employment such as paid sick and vacation days, health insurance, wages, and other benefits. Diaz testified that the survey results revealed that the workers were not paid sick days or receiving standard wages as required by the Connecticut Department of Labor (DOL). Diaz' first interaction with the DN employees was in early 2019. Subsequently, he led or joined the DN employees at various rallies and protests. Although the first of these actions had occurred in about May 2019 at a McDonald's store on Route 10 in Southington, Connecticut to celebrate Connecticut Governor Lamont's signing into law the $15 minimum wage bill, a number of the rallies and protests took place outside and at times inside the DN plaza. Media outlets such as NBC Connecticut, along with the Governor and other state politicians broadcast these events. (Tr. 60–63.)

The record is replete with evidence of Union sponsored rallies, demonstrations and even a couple of walk-outs in support of the organizing campaign as well as workers' right to fair wages, benefits and safety equipment and the return of employees laid off due to the pandemic. The record also reveals that Discriminatees Mario and Rosa actively led early organizing efforts. In fact, Mario was one of the first employee organizers and Rosa was one of the first coworkers with whom Mario shared Union information about ensuring their rights as fast food workers. (Tr. 435.) In addition, Mario solicited and collected signatures on two petitions (one in 2019 and one in 2020) in support of the Union, employee rights and in protest of not returning the Discriminatees to work. Both Mario and Rosa participated in many if not most of the Union's organizing activities in 2019 and 2020 both before and after the March 2020 pandemic layoffs. Further, the Union's communication point person often reached out to Mario and Rosa to be interviewed by the media. (Tr. 223–224.)[21] The record evidence further shows that Discriminatees Mestanza and Vazquez also participated in signing the petitions and many of the organizing activities but not at the level of Mario and Rosa. It is also evident that many of the

[20] Caban was a full-time crew member on the early morning shift; Punto was a full-time crew member on the morning/evening shift; and Fajardo, one of the new hires, appears to have had a flexible schedule. There is not a Maria Esperanza on any of the schedules or employee lists admitted into the record. However, this may be one of the Montaleza sisters, Maria E, who was a part-time crew member with a morning/evening shift schedule. (GC Exh. 73, R. Exh. 13.)

[21] Union Field Organizer Sandra Reyes explained how the Union's communication department published press releases and sent them out to various media outlets. (Tr. 226–228.)

DN employees, including those who were not laid off and/or were laid off but returned in May 2020 also joined in signing the petitions and in organizing actions.[22]

2. Pre-layoff union organizing participation

a. 2019

As discussed above, one of the first union organizing events occurred in May 2019 to celebrate the passage of the CT $15 minimum wage bill. Both Mario and Rosa participated in this highly media covered celebration as did other DN employees.[23] Both Mario and Rosa were photographed and visibly wearing the Union's purple shirts. One of these photos taken with the governor was placed on a flyer and distributed at Connecticut service plazas, including DN. (Tr. 62–63, 71–72, 435; GC Exhs. 4, 8(a), (b).)

Rosa also appeared in her union shirt on local news broadcasts, with US Congressman Jim Himes and Union Vice-President Juan Hernandez (Hernandez), at an August 28, 2019 "Connecticut Service Plaza Workers Rally for Fair Treatment and a Union," at the DN service plaza. Connecticut WTNH News 8 reported Rosa's statement that, "'The work is hard and I need more money. . . I need more salary, more benefits, good vacation.'"[24] News 8 pointed out that Rosa had been working at DN for over 12 years and wanted to be "the voice for employees who are afraid to speak out." The protestors claimed workers had been "'cheated out of millions in pay.'" (GC Exhs. 9(a)-(b), 12(a)-(b).) This event served as the Union's announcement of its organizing campaign. Other news outlets, including the Connecticut Post, reported on this event. (GC Exhs. 9(a)-(b), 12(a)-(b), 14, 47.) In addition, McDonald's broadcast these news clips of the rally inside their stores and DN store manager Aguirre and her supervisor, Arellano admitted that they had observed the rally. (Tr. 333, 1146, 1058.) During this event, the Union announced its intent to file a claim against Respondent, and other fast food franchisors/franchisees, with the Connecticut DOL for violating Connecticut's Standard Wage Law. (Tr. 74–76, 218; GC Exhs. 9(a), 9(b), 14.)

[22] 24 DN employees (who did not quit prior to the pandemic) signed one or both of the petitions. They included 14 who were laid off and 10 who were not laid off. Of the 14 who were laid off, Respondent attempted to recall or recalled all but the four discriminatees. (See prior findings in this decision and R. Exhs. 7, 9; GC Exh. 76-all documents from Respondent's records.)

[23] Itamar Contreras, Elma Vasquez, and Maria Montaleza also participated in this event. (Tr. 154–155, 157–159; GC Exh. 4.)

[24] I overruled objections to these various news stories and broadcasts covering the Union organizing events as well as quotations from union members and DN employees, including the four Discriminatees. They were not offered for the truth of what was said but to show that public news/media outlets broadly covered union activity and in doing so featured interviews and photographs and videos of employees' union organizing activity. In addition, newspaper articles are self-authenticating and not hearsay. *Sheet Metal Workers Local 15*, 346 NLRB 199, 202 (2006); *B.N. Beard Co.*, 248 NLRB 198, 199 fn. 9 (1980). Video of television interviews have been found to be "effectively self-authenticating," where they bear the network's logos, show no signs of being edited. *Linde v. Arab, PLC*, 97 F. Supp. 3d 287, 342 fn. 28 (E.D.N.Y.), vacated and remanded on other grounds 882 F.3d 314 (2d Cir. 2018). Moreover, the witnesses making the statements, Mario and Rosa, testified as to their authenticity.

Prior to the August 28 union rally, on August 23, 2019, Rachel Kaprielan (Kaprielian), with McDonald's Corporation's U.S. Government Relations, New England office, emailed and copied many individuals within the McDonald's organization, including Respondent's owner, Michell. She attached a union flyer and wrote that,

> We got wind of this from a press call (and I gathered some other intel from our lobbyists.) The State Police has shared that SEIU 1199 plans to hold a rally (or possibly rallies) at the service plazas to organize workers. We presume that all business tenants in the plazas (McDonald's, Subway, Dunkin Donuts etc.) will be targeted.
>
> There is nothing to 'do' here—no reason to be alarmed, it is mostly a heads-up to you and your workers. In similar situations, the gatherings have been peaceful, not overly large and over in a short period. Carry on as you would as it were any other day.
>
> McDonald's USGR and Legal are aware of this and we will get more information for you just as soon as we can. Meanwhile, here is a flyer that we came across.

(GC Exh. 47, pp. 3–5.) On August 26, 2019, Kaprielian notified Michell and that the Union planned a rally at the Connecticut Turnpike plazas for August 28. It read:

> Below is a copy of the media advisory that SEIU is circulating for the rally on Wednesday at noon, and we now know that Congressman Jim Himes, State Senator Julie Kushner and State Representative David Michel are slated to speak. The advisory references that McDonald's and Subway workers are also expected to speak.
>
> I have been in touch with some of you, and I know that everyone is informed that the protesters have a permit, the State Police is aware, and as mentioned, there is no reason to think that anything 'over the top' will occur.

(GC Exh. 47, p. 1.) Kaprielian attached a media advisory regarding the rally, "Connecticut Service Plaza Workers Rally for Fair Treatment and a Union, Workers filing complaints with Department of Labor indicating massive wage theft." The advisory specifically named "Food service workers at McDonalds Darien northbound" as being slated to speak. (Id.) The advisory further noted the workers uniting with 32BJ SEIU and that this "campaign was announced this morning in a national story in Bloomberg News." (GC Exh. 47, pp. 1–2.)

In addition to news broadcasts, Mario and Rosa appeared in multiple news and social media articles and posts arranged by the Union's communications team. The Union's communications team posted them on its public social medial account pages and disseminated

them to other news outlets. In one of its November 18, 2019 posts, the Union pictured and introduced "3 service plaza workers on I-95 organizing for respect, including "Mario Franco from McDonald's in Darien," and described how "[a]fter years of mistreatment, they're leading their co-workers to demand #UnionsForAll." (GC Exh. 34.)

On December 1, 2019, Megan Gaffney (Gaffney) an account director with Shift Communications, Inc. emailed Michell with copies to Kaprielian and others within the organization: "George, The Connecticut Post ran the below article on the CT service plaza unionization. This has been shared with the national communications team. . . [i]f we receive additional guidance, we will share it with you and also monitor for additional pickup." Gaffney included a link to the article entitled "The immigrant heart of a historic McDonald's union drive." Rosa and Mario were pictured in the November 2019 article at the SEIU office in Stamford, Connecticut. However, the article featured the stories of three women, including Rosa from Respondent's store, noting that "[t]hey may become pioneers in organized labor history. At the moment, Yadira Martinez, Guadalupe Lopez and Rosa Franco are just angry, frustrated workers like so many others." It also described them as being "in the early core committed to joining the union. . . " The news piece specifically pointed to Michell Enterprises LLC as one of the "32BJ targeted McDonald's locations, including the one where Franco works."[25] (GC Exhs. 47, pp. 3–5; 48, pp. 1–7.)

Between early September and December 10, 2019, Mario collected signatures, including his own, of 33 DN coworkers on a petition demanding the respect they deserved for their work, the wages required by the Connecticut Standard Wage Law and "the opportunity to organize with the union of [their] choice free of intimidation." (GC Exh. 2.) He solicited this support from his coworkers in the DN service plaza parking lot and at their homes. (Tr. 439–440, 461.) Rosa and Mario were the first to sign the petition on September 13, 2019, and Mestanza and Vasquez signed on September 15, 2019.[26] (GC Exh. 2; Tr. 485, 487.) On December 18, 2019, Mario and Rosa and other DN employees delivered this petition to Respondent's headquarters in Windsor Locks, Connecticut. April Hernandez, Respondent's account manager who reports to Cukurs, received the group and the petition on behalf of Respondent and Michell. In doing so, she recognized and named both Mario and Rosa and also Martin Huamani. DN employees

[25] The photograph at GC Exh. 48, p. 1 depicts Rosa, second from left and Mario fourth from left. The caption also names an "Ema Vasquez" as one of the "McDonald's employees who work[s] at locations along Interstate-95." Respondent did not have an "Ema Vaquez" listed on its employee rosters and it is not clear as to whether this was the same DN shift manager, "Elma Vasquez," who did participate in some of the union activities. (GC Exh. 48, p. 1; R. Exhs.10, 13.) However, Rosa is the only employee of Respondent featured and interviewed in the article. The other two women worked at a Milford, Connecticut McDonald's restaurant owned by another franchisee. (GC Exh. 48, pp. 1–3.) The photograph at GC Exh. 48, p. 2 depicts the inside of the DN rest area. It does not show the DN McDonald's window but shows how the fast food restaurants are situated facing the open plaza area in a food court design.

[26] Mario and Organizer Reyes testified that DN employees Martin Huamani, Erika Monge, Maritza Lemus, Itamar Contreras, Neika Alexis, Sisters Maria X and Maria E. Montaleza, Neressa and Neica Lafleur, Consuela Punto, Maynor Gudiel, Besly Paul, and Elma Vasquez signed one or two of the petitions and participated in rallies and demonstrations. (Tr. 304–305, 307–309, 485–486, 488–489; GC Exh. 2.)

Itamar Contreras also accompanied Mario and Rosa to deliver the 2019 petition. (Tr. 433–439; GC Exh. 44.)

b. 2020

In January 2020, The Union featured Mario in one of its twitter post photos of "highway service plaza workers" attending the opening of the Connecticut legislative session in January 2020 and thanking legislators "for championing Fair Work Week legislation & the Captive Au[d]ience bill—and the fight for a union!" Mario and other DN employees are in the photo. (GC Exh. 35.)

On February 11, 2020, Fred Soykan, one of Respondent's operations managers, forwarded an email to Michell, with copies to Encarnacao, regarding "Business Disruption Alert: SEIU 32BJ Rally at Service Plaza in Darien, CT ; Wednesday, 2/19/20" This alert specified that "SEIU 32BJ and affiliate groups will gather at the Darien Northbound Service Plaza, which has a McDonald's restaurant." (GC Exh. 49.)

3. 2020 Post layoff union participation

On March 31, 2020, Mike Modine, (Modine) director of operations, Project Service LLC sent an email to Ed Abraham with McDonald's corporate, which was ultimately forwarded to Davis, Michell and Encarnacao regarding a March 27 32BJ press release.[27] Modine wrote: "I wanted to share this message that was just sent to us from the DOT. It's unfortunate that misinformation is being spread during these challenging times." (GC Exh. 50, pp. 1–3.) The press release entitled "Connecticut Interstate Service Plaza Workers Demand Support in Pandemic. . .'Essential workers' face denial of sick time, cuts in hours, lack of protections." The release described some 950 food service workers across the Connecticut interstate system as facing systemic abuse and risks to health due to the Covid 19 pandemic. The article specifically named Mario as a DN McDonald's employee who stated "'I have been working as a nightshift manager at McDonald's for three decades. . . Now, this week, the entire nightshift and I have been let go, including single mothers. . . '" (GC Exh. 50, pp. 3–4; GC Exh. 15; 36.) This release noted two other union actions that had taken place the week before. One involved a car caravan protest during which workers drove through the DN rest stop "blaring their horns" with signs stating, "'McDonalds, use your billions to serve your workers!' and 'McDonald's is not safe for you or me.'" The second involved Senator Richard Blumenthal and union members who participated in a Zoom conference call with workers regarding unsafe work conditions and lack of equipment which threatened the health of workers, travelers and their communities. Mario and Andrea Hernandez from DN participated in that call. (GC Exh. 18, pp. 7–8, 80, GC Exh. 19.) The legislators had previously sent a letter to Project Services LLC "demanding action." (GC Exh. 50, 51.) A similar press release issued on March 29 with the same Mario quote.[28] (GC Exh. 16.) Another of the Union's press releases dated April 14 ("McDonald's on I-95 Fail

[27] Modine received this press release from Connecticut's department of transportation director. (GC Exh. 50.)

[28] In late March and April, several print media outlets reprinted the same or similar Mario quotes including, LaVoz Hispana De Connecticut on April 2, BBC News Mundo, the Associated Press and a Connecticut Communist Party USA newsletter. (GC Exh. 17(a), (b), 22, 24.)

to Disinfect after Workers Test Positive for Coronavirus"), announced that a car caravan to protest "the mistreatment and dangerous conditions" would be driving through the parking lots of the Milford and DN McDonald's stores at 11 a.m. that day.[29] DN Employee Andrea Hernandez and a DN worker who had contracted Covid were quoted in this release, which also stated that, "[d]uring the current pandemic, many workers who had been organizing with 32BJSEIU for better working conditions [had] lost their jobs." Rosa also participated in the April 14 caravan rally along with Mario and DN employee Roxana Rodriguez, "demanding PPE and sick days because of COVID." Rosa confirmed that a couple of news outlets accurately quoted comments that she made during this rally. (Tr. 352–353; GC Exhs. 23, 30, 38.)

An article in the Hartford Courant newspaper on April 2, also referenced the safety concerns among service plaza workers, including the same or similar quote from Mario lamenting about Respondent's recent layoff of many experienced workers like him. (GC Exh. 19, p. 7.) Another article on April 6 at DCReport.org, reported how Mario had been laid off after working at DN rest stop for over 25 years. This article quoted Mario's statement that, "'[m]anagement did not give us an opportunity to move shifts or giving us at least a day of work – they did not respect our dedication and experience.'" (GC Exh. 20, p. 3.)

On May 1, the Union issued a press release announcing online viewing available of a rally that took place at noon with hundreds of cars from across the state forming a caravan at the State Capital. The release also quoted Rosa stating, "'McDonald's workers at the rest stops are getting sick, and some of us are getting laid off with no warning. . . . They're not protecting us, they're not giving us sick pay, and many of these workers are single mothers with children at home. I'm asking Governor Lamont to please intervene and support us!'" (GC Exh. 23, p. 3.) During a Zoom "May Day Rally" hosted by the CT Communist Party USA, Mario gave a lengthy speech about the poor conditions and mistreatment of employees at Respondent's McDonald's rest stops. (Tr. 24.) On May 21, union workers and community members began another car caravan at the DS service plaza.

On June 11, the day before Cukur's termination letters were dated, and the same day the underlying charge in this case was filed, the Discriminatees attended a rally with politicians and union officials protesting the lack of PPE for the current workers and Respondent's failure to return them to work. Rosa testified that she observed both Aguirre and Encarnacao walking in the parking lot in front of the DN plaza with their cell phones raised as if to video tape them. She claimed to have heard Aguirre say that "she was going to tell my boss what I was doing." (Tr. 343–344; GC Exhs. 10(a)-(b); 1(b)) Mario, Vazquez, and Mestanza also joined this rally. Reyes testified that she saw supervisor Arellano standing outside the main door of the Plaza and Encarnacao and Aguirre "walking through the walkway of the parking lot just observing and smiling." (Tr. 265–267.)

On June 18, Rosa, Maria and Mestanza accompanied others to Respondent's headquarters to deliver a petition to Michell in support of the laid off workers[30] (GC Exh. 3, Tr.

[29] Franklin Soults, 32BJ SEIU's senior communications associate, sent this and other of the Union's press releases.

[30] Respondent's headquarters employee, April Hernandez, once again received the protestors and petition (GC Exh. 3.) Cukurs acknowledged receipt of both petitions. (Tr. 625-630)

267–269, 300–301, 437–439.) Other former and then current DN store employees who joined them in delivering the petition included (but were not necessarily limited to) Itamar Contreras, Jocelyn Gomez, and Roxana Rodrigue. (Tr. 346–347; GC Exh. 41.)

On June 25, Rosa and Mario (and Roxana Rodriguez and Jocelyn Gomez) joined politicians and union representatives in a strike during which current DN store employees walked off the job to protest Respondent's failure to reinstate former McDonald's employees to work while it had hired new employees. They also protested "'systemic mistreatment" relating to unsanitary conditions following a Covid-19 outbreak in one of the stores and poor wages and benefits.[31] (GC Exh. 11(a)-(b)), 28, 29(a)-(b).) Rosa testified that she observed Encarnacao and Arellano outside the DN plaza watching them with their cell phones held up like they were filming them. (Tr. 347–351; GC Exh. 29(a)-(b).) The protesters returned the next day to accompany their former coworkers, Maritza Lemus and Maria Gonzalez, back to work. (Tr. 351.)

On July 9, the Guardian newspaper printed an article that quoted an earlier interview with Rosa talking about how she believed the laid off DN employees were not rehired because some were leaders in the unionization effort and Respondent "'wanted to get rid of people who raised their voice."' Rosa also gave an interview about this event which was reported in U.S. News and World Reports. (GC Exh. 30, pp. 3–4, 31, pp. 2.)

The Union conducted a large rally at the DN rest stop on September 3 in celebration of the Connecticut DOL finding that Respondent had violated Connecticut standard wage law owed its employees in the turnpike stores back pay with interest for about $870,000.[32] (Tr, 355, 356.) This victory rally on September 3 along with the DOL determination was widely publicized across media outlets.[33] (Tr. 130–131; GC Exhs. 31–32, 39.) In fact Rosa identified herself as one of the speakers in a photo of the event, with Mario and Martin standing behind her. She was quoted as claiming that she "[believed] the store managers used the pandemic as an excuse to get rid of my entire night shift, which had some of the most experienced workers in the store, just because we demanded fair treatment." (Tr. 355; GC Exhs. 31–32, 39, 52.) She observed Arellano sitting outside the DN service plaza raising his cell phone as if to film the event. (Tr. 357, 527.)

On November 23, Union 32BJ Organizer Diaz sent Respondent a letter notifying Respondent of its intent to stage a strike at the DN plaza to commence at 4 a.m. on November 24 and end at 4 a.m. on November 25. (GC Exh. 46.) Once again, several DN store employees

[31] This June 25 job walk off at DN was widely reported on the Union's public twitter account as well as news outlets such as LaVoz Hispana as were the other rallies. State legislators were also present. The LaVoz article at GC Exhs. 29(a)-(b) is in Spanish and English. (Id.)

[32] The Connecticut DOL made its finding after an investigation and audit of Respondent's businesses (during which Respondent cooperated) (Tr. 87–91.)

[33] Other news outlets, including U.S. News and World Reports, WNPR public radio, News 12 Connecticut and the Stamford Advocate also reported on this event. In addition, a public relations firm sent a couple of the news reports included in the "McDonald's Morning Clips." Some of these news clips were also included in an email to Respondent. (Tr. 644, GC Exhs. 31, 52.)

walked off the job on November 24 to join union representatives, state politicians and laid off employees in protest of poor working conditions and laid off employees not being returned to work. Rosa testified that she observed Arellano sitting outside watching them. The next day, the protestors including Rosa and Roxana Rodriguez, along with the union organizers and politicians, walked DN store employees (including employee Maria Gonzalez) back to work inside the plaza. Although Rosa testified that they would not permit the employees to return to work on November 24, there is no evidence that Respondent precluded them from going back to work on November 25 pursuant to the Union's strike notice. Media reporters also attended this organizing action. (Tr. 357–358, 360–367; GC Exh. 33.)

I find that it would have been nearly impossible for Respondent to have ignored or missed the widely publicized and visible DN workers' involvement in multiple union organizing and worker rights events and protests or the very visible and prominent participation and leadership of Rosa and Mario.

G. Other Alleged Protected Activity

Although Discriminatees Mestanza's and Vasquez' union activity did not reach the level of Rosa and Marion, they signed both petitions and participated in multiple protests and rallies before and after the March layoffs. In addition, the General Counsel alleges that both Mestanza and Vasquez engaged in other protected activity when they warned Aguirre about a rumored and potentially problematic romantic relationship between Aguirre's married brother, DN store shift manager Leonel, and then crew member Delia. It is further alleged that this relationship "led to favoritism" in scheduling hours. (GC Exh. 1(c).) Mestanza and Vasquez also testified that Aguirre had disparaged the Union and supporters privately and also publicly in the kitchen area during a couple of the shifts in late 2019 and/or early 2020.

Vasquez testified that in November 2019, she met with Aguirre, whom she considered a friend, over coffee, and warned her about a store rumor that her brother Leonel and Delia had been having an affair. She claimed that Aguirre became upset and chastised that, "[i]nstead of talking about these things, instead of gossiping about this stuff or getting involved in the Union, and she did mention the Union, that we should just do good work." Vasquez claimed that she recommended that Aguirre confirm the rumors by checking the store cameras. Vasquez said that Aguirre indicated that she knew about the signatures being collected to support the Union and that Vasquez would never give her signature to support the Union. When Vasquez advised that she had in fact signed the petition, Aguirre scolded her for not consulting with her first. Vasquez insisted that she did not have to consult with her to support the Union for "a better life." According to Vasquez, Aguirre accused the Union of only taking workers' money and being "just people who don't do anything." (Tr. 517.) Vasquez claimed that after this meeting, Aguirre stopped being friendly toward her and on a couple of occasions came to the kitchen during her shift (Vasquez') to disparage the Union and warn them (employees) that it was "not going to do anything good for you," and to just "ask Milagros [Vasquez] about the Union…she knows all about it." Vasquez also testified that in March when Encarnacao informed them about the layoffs, she (Vasquez) complained that it was not fair to let go those with more seniority while "Leonel, who is the brother of the store manager, and Delia. . . have been given 40 hours a week. But others have not." She claimed that after "[t]hey said nobody has 40 hours, nobody

has a full schedule 40 hours," that she urged them to check the punch cards because "[t]hese people do have 40 hours and it's not fair."[34] (Tr. 511–512, 514–517.)

Similarly, Mestanza testified that in the Fall of 2019 (between September and November 2019), Aguirre told her that she knew the Union had been in the plaza and that it "wasn't good for any of [the employees]" and that "if [they] accepted to be in the Union [they] would have a lot of problems." Subsequently, Mestanza also claimed to have witnessed Aguirre shouting (in a loud tone) to employees in the kitchen that they could get into trouble dealing with the Union since Respondent did not like the "union business" and warning that they could "get into serious problems, if [they] accepted the Union." (Tr. 576–581, 616.) On cross-examination Mestanza was asked about her affidavit statement that, "I have never spoken to any of the managers about the Union." In response, she stated that, "[y]eah. I did not talk with anyone about my participation in the Union. That's not—that's personal stuff. I—the only people I spoke with about that were Mario and Rosa." Although Mestanza apparently did not mention Aguirre's discussions with her and other employees in her affidavit, her statement that she did not talk about her personal Union support or involvement to any of the managers is not inconsistent with her testimony that Aguirre mentioned the Union to her and her coworkers. (Tr. 616–618.)

Mestanza testified that a few months later when Aguirre mentioned to her that she was considering assigning Delia to assist Leonel on a shift, she cautioned Aguirre that it was not a good idea considering the rumors about their romantic relationship. Mestanza further testified that she warned Aguirre that putting them together "could bring problems for the store" because Leonel was married. Mestanza testified that "everyone knows that [Leonel] is married" and knows his wife because "[s]he used to work in the store with us too. . . there could be a problem because the wife of Leonel could find out about this, and then we in the store would all have a problem." (Tr. 590–592.) She also recalled Vasquez raising a concern in the March layoff meeting that Leonel and "a new girl, by the name of Delia [Escobar], had a lot of hours and were not being laid off. She added that when Encarnacao denied this accusation, Vasquez told her to just "check [the hours] more carefully, because Leonel is the one with the most hours here, and everybody in the store knows that." (Tr. 586–588, 616–617.) I credit Mestanza's and Vasquez' testimony about what their responses during the March layoff meeting. They corroborated each other's testimony and Arellano who was present either did not recall what was said or just did not substantiate Encarnacao's version of that meeting. (Tr. 1060–1064.)

Aguirre denied ever discussing with or disparaging the Union to any employees including Mestanza and Vasquez. She also denied having any conversations with them about a rumored relationship between Leonel and Delia. Vasquez did mention her discussion with Aguirre about Leonel and Delia in her affidavit statement. I credit her testimony in this regard as it is consistent with that of Mestanza's.

[34] In her affidavit, Vasquez stated that Arellano said that it "was a lie" that Leonel and Delia were working 40 hours or more and that she then told Encarnacao to "check the cameras and the computers. . . [t]hey told us they were very sorry but for now there were no more hours and that's why they were laying us off." However, this does not affect the veracity of her testimony. (ALJ Exh. 3.)

I. Respondent's Pandemic Economic Downturn Justification

Respondent relies on the pandemic-related economic downturn of its DN store as justification for not rehiring the Discriminatees. Although Cukurs provided testimony regarding Respondent's financial plight during the pandemic, she was not involved in any of the decisions regarding which employees were laid off, which were brought back, new hires or promotions or the decision to suspend and bring back the ONS. In addition, some of the documents on which she relied contained inconsistencies with other documents. (Tr. 811–812.) She testified that once the pandemic hit, the DN store lost bus traffic and vacationers traveling from New York City and between March and May, sales and transactions declined significantly resulting in cuts in hours and staff and the layoffs. In support of its decision regarding the Discriminatees, Respondent provided documents showing the decline in its sales, transactions, profits, and labor costs in 2020 compared to those numbers in 2020. The record reflects that as of November 30, 2019, Respondent's net income was over $400,000 compared to November 30, 2020 year to date in which the store lost about $300,000. (R. Exhs. 15, 1–2.) In April 2020, transactions fell by about 69 percent. As anticipated, DN store transactions and sales began increasing in May and peaked in July and August but not to the prepandemic numbers. For example, the May 22, 2020, weekly hours were 837 compared to 1442 hours in the same week in 2019. (Tr. 769.) In July and August 2019, sales ran about $550,000 per month versus July and August 2020 when they declined to about $300,000 per month. Sales and transactions began to decrease with the change in seasons and continued to decline in September through November, trailing those recorded in 2019 during the same period. (Id.) Cukurs testified that despite a "slight rebound from early days of pandemic," it did not make economic sense to bring back all laid off employees. (Tr. 756.) She stated that currently (time of hearing) with 32 employees on payroll, they had only used 770 hours at the DN store which was the equivalent of less than 24 hours on average per employee. (Id.) Cukurs further described how they could only attempt to meet labor cost targets for the DN store by reducing work hours and/or keeping employees with lower hourly wage rates. (Tr. 833.) She explained that crew payroll expenses in 2020 rose to 22.2 percent compared to 16.38 percent in 2019.[35] However, Cukurs failed to explain how, instead, it made more economic sense to hire new employees to work 7-8 hours a day and give raises and promotions to five former crew members during the same time period.

Regarding questions regarding what Respondent did with the over $700,000 federal payroll protection plan loan it had secured during the pandemic, Cukurs explained that it "only covered payroll for 12 weeks and was used for that purpose." However, combined financial statements prepared by Respondent's accounting firm and dated December 28, 2020, fail to reflect those funds or how they were used. Moreover, the accompanying letter stated that:

> Management has elected to omit substantially all of the disclosures ordinarily included in the combined financial statements prepared in accordance with the income tax basis of accounting. If the omitted disclosures were included in the combined financial

[35] Prior to the pandemic, the DN store's labor costs were not to exceed 18 percent of sales. However, after the onset of the pandemic Michell readjusted the DN labor cost targets not to exceed 19.5 percent of sales.

> statements, they might influence the user's conclusions about the Company's asset, liabilities, equity, revenues, and expenses. Accordingly, the combined financial statements are not designed for those who are not informed about such matters.
>
> The accompanying supplementary information is presented for purposes of additional analysis and is not a required part of the basic combined financial statements. Such information is the responsibility of management. The supplementary information was subject to our compilation engagement. We have not audited or reviewed the supplementary information and do not express an opinion, a conclusion, nor provide any form of assurance on such supplementary information. The Company expects the economic uncertainties resulting from the COVID-19 pandemic to negatively impact its operating results. However, the related financial impact and duration cannot be reasonably estimated at this time.
>
> We are not independent with respect to Michell Organization.

(Tr. 898.) I do not doubt that the effects of the pandemic significantly impacted Respondent's business operations. However, I find that Respondent has not been entirely transparent on the extent of that impact and as to how it resulted in the Discriminatees being treated differently than other of its DN (or DS and Fairfield store) employees. Despite Respondent's claim, Respondent offered reemployment to all of its DN employees laid off in March except for the four Discriminatees, hired three new employees and promoted five then current crew members to shift manager positions knowing that they were facing an increase in employee payroll expenses due to the Connecticut standard wage increases.

Encarnacao claimed that she hired the three part-time employees (Jessi Fajardo, Yessenia Estrada, and Tomasa Aquino) in late May and early June (rather than bring back the Discriminatees) because they were lower paid crew members capable of working in all areas of the store and available for multiple shifts-unlike for example, Vasquez. (Tr. 961–962.)[36] Encarnacao testified that she used a sales report retrieved from Respondent's electronic personnel files to make layoff and recall decisions and to determine how many employees were needed on each shift. As an example, she stated that additional crew members were not needed on the overstaffed shift on which Vasquez had worked. Nor were they needed on the ONS where labor costs remained high when it reopened in October.[37] (Tr. 954–957.) She noted that in January 2021, with three shifts per day and only 21 available shift manager shifts per week,

[36] Cukurs testified that Estrada and Aquino were laid off around December 7, 2020. (Tr. 839.) The last weekly schedule report including their names was that ending on December 6, 2020. (GC Exhs. 77, pp. 48–49.) Cukurs also testified that Respondent did not replace three other employees terminated at the end of December 2020 for drinking on the job. (Tr. 839.) Arellano first testified that they transferred a "few" other shift managers or employees from another store to work but quickly changed his testimony to only one shift manager transfer on one occasion for a few hours. (Tr. 1075, 1216.)

[37] R. Exh. 4 shows the total hours paid to all employees per week from January 7, 2019 through December 6, 2020. (Tr. 766–770; R. Exh. 4.)

there were only eight shift managers employed at the DN store. This included seven ONS shifts available per week. (Tr. 842–843.)

Encarnacao testified that she found employees' availability information in the employee roster maintained in the EHR system. Yet she contradicted herself once again when she stated that the roster did not in fact include any information about the DN store employees' availability to work or their wage rates. She finally admitted that she obtained information about employees' availability to work from Aguirre who had it "in their files." (Tr. 977–978, 981–982, 1031–1032, 1034.) However, as previously stated, Aguirre adamantly denied providing Encarnacao with any information about employees who had been laid off or returned to work, including any relating to their availability and desired shifts.

In addition, Encarnacao testified that since the ONS had been eliminated there was no longer work available for Mario and Rosa. As for Mestanza and Vasquez, she asserted that they "made more money than anybody else did in the entire store. So I made it based on balancing it out based on what we needed in the restaurant."[38] (Tr. 1032, 1034.) However, Vasquez' wage rate when she was laid off was not the highest among other crew members but the same as many of them who were kept on or returned. Encarnacao testified that she decided to layoff and not recall managers who had the highest wage rates, including Mario, Rosa, and Mestanza. However, neither Rosa, Mestanza, nor Mario had wage rates higher than Lorenza Huamani and Rosa had a similar wage rate as that of many other shift managers. (R. Exh. 10, Jt. Exh. 1.) Also as previously discussed, the evidence reveals that as early as May 2020, Respondent knew, based on the schedule of increased wage rates per the Connecticut Standard Wage scale, that had the Discriminatees been recalled in May or June, they would have been making the same or nearly the same as those called back to work. At the same time, Encarnacao insisted that she also took into consideration the discriminatees' availability to work other shifts along with knowledge from Aguirre that Mario had another day job; Rosa had either another day job or cared for an elderly lady; Mestanza had to take care of her sick father; and Vazquez' English was not sufficient to work the counter or drive-thru window serving customers. However, as discussed further below, the evidence simply does not support Encarnacao's assertions. Since Aguirre denied giving Encarnacao any of this information, Aguirre's testimony about employees' availability is irrelevant and Encarnacao's is completely discredited.

J. Additional Credibility Determinations

A credibility determination may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, and the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record as a whole. *Poudre Valley Rural Electric Association,* 366 NLRB No. 21 (2018); *Double*

[38] When asked to produce the roster alluded to by Encarnacao, counsel for Respondent told the General Counsel to ask Encarnacao. In turn, Encarnacao testified that "it's on QSR Soft. . .[i]t's a document that really has just the name of the person and the date, you know, so it is a rolling roster so from day-to-day it will change. So it's just a roster." (Tr. 1035–1036, 1038–1039.) I find that despite Encarnacao's rambling, inconsistent testimony regarding what she relied on to determine employee availability, the actual document is not necessary since she reluctantly admitted that the roster did not contain that information. (Tr. 1039–1040.)

D Construction Group, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. 56 Fed. Appx. 516 (D.C. Cir. 2003). Credibility findings need not be all-or-nothing propositions—indeed, nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness' testimony. *Daikichi Sushi*, 335 NLRB at 622.

1. Respondent's knowledge of union activity

Generally, I discredit the testimony of Respondent's witnesses regarding their knowledge of protected activity involving the Discriminatees and the Union. Cukurs unbelievably testified that she did not pay attention to or read various emails she received directly or indirectly from a McDonald's corporate communications firm or corporate government relations office alerting Respondent about union actions. The evidence described above reveals however that Respondent received emails from Megan Gaffney with Shift Communications with attached articles that named and pictured Rosa and Mario as DN employees who participated in Union actions and included quotations from their interviews. It also reflects that Respondent was well aware of and alerted about numerous union protests and rallies throughout 2019 and 2020 during which its DN employees protested against how Respondent failed to pay fair wages, exposed them to poor working conditions during the pandemic and failed to return laid off employees. Some of the media reporting was even broadcast throughout McDonald's stores including those of Respondent. On December 1, 2019, for example, Gaffney of Shift Communications sent an article to Respondent featuring part of Rosa's interview and referencing how she and two other workers were potential "pioneers in organized labor history" who were "in the early core committed to joining the union." It mentioned Rosa's frustration at being underpaid as a night manager at the DN service plaza. (GC Exh. 48, pp. 1, 5–6.) On March 31, 2020, Michell forwarded the February 19 email sent to him and Encarnacao along with a 32BJ press release to Cukurs regarding rallies and a protest against systemic abuse and health risks to employees. The press release included a quotation from Mario identified as a DN McDonald's worker. (GC Exhs. 49, 50 at pp. 3–4.) On April 14, Michell received another of 32BJ's press releases (copied to Encarnacao) regarding a protest against "McDonald's on I-95" failure to disinfect after workers tested positive for COVID-19. And of course, there was the widely broadcasted print and television media attention around the Connecticut DOL's finding that Respondent violated the Connecticut Standard Wage law owing employees to the tune of about $870,000 in back pay at its DN, DS, and Fairfield stores. (See e.g., GC Exh. 52.)

Despite her claim that she either did not receive, recall receiving or simply did not read them, Cukurs reluctantly agreed that Respondent received the petitions in December 2019 and June 2020 from the DN employees and believed that "we received one" of the union press releases. (Tr. 269–630, 632; GC Exh. 56.) When asked if Respondent received union media advisories, Cukurs replied: "I believe not," but admitted that she received news articles from the corporate communications team regarding Union presence at the stores. (Tr. 633.) She also insisted that she did not recall whether the McDonald's corporate government relations team informed Respondent in 2019 that their lobbyists were gathering "intel" about one of the Union's planned events. She admitted that in December 2019 Respondent received a news article featuring a picture of Rosa and Mario and describing how they had voiced their support for the Union. However, she added that she did not know what it said because "[she] did not read the entire article." She did not remember seeing the press release quoting Mario in March or April

2020. (Tr. 631–634.) However, when shown an email from Rachel Kaprielian from Respondent's government relations office, she admitted she and Davis received it but "[did] not recall if [she] read it." Cukurs also begrudgingly acknowledged receipt of an email forwarded to her from Michell with an attached union press release sent from Michell's personal email account. The press release announced a "Connecticut interstate service plaza workers demand support in pandemic," and at the bottom was a quote from Mario. Once again, Cukurs claimed not to have read the press release. When I asked if she read her emails, she said, "I often—I get a lot of emails. And I glance at the topics. And yeah, I do not read all my emails That is true." (Tr. 635–644.) Similarly, when shown an example of a McDonald's morning clip and asked if it was sent to stores in the Tri-state area, she initially responded that "[she didn't] know who it's sent to." Again, she ended up admitting, with great reluctance, that she had seen the McDonald's morning clip article reporting the finding that Respondent had violated the standard wage law. Overall, Cukur's evasive, misleading and inconsistent testimony belies any testimony and/or claim by Respondent that it was not aware of union activity on the part of its employees, in particular that of Rosa and Mario.

Similarly unbelievable is Encarnacao's claim that she was too busy to know all of her employees and the extent of their support of the Union and participation in the various rallies. Encarnacao insisted that, "[i]t would be impossible for me to know everybody's name and what they look like and remember because those people also worked the overnight shift, so I would never interact with them all." The evidence places Encarnacao, Aguirre and Arellano at the DN service plaza during several of the rallies in which the Discriminatees participated. Further, Encarnacao's knowledge about each Discriminatee's availability to work other shifts is contrary to her claim not to have been aware of individual employees' participation. Nor am I persuaded by her general denials and testimony that since her "husband is Union" and she believes that "everybody has a choice of what they should want for themselves," she could not possibly have any animosity towards the Union or its supporters. Finally, given her receipt of alerts about Union activity and her presence during one or more rallies at the DN plaza, it is beyond believe that she just ignored what was going on and simply was "not interested in anything else. . . . but making sure the business runs well." (Tr. 915–917.)

Next, Encarnacao and Aguirre disputed allegations that they were recording the union and employee protestors including Mario and Rosa. They testified that they were merely holding up their cell phones pretending to photograph and video record them because the protestors were videotaping them. First, I find that more likely than not Encarnacao and Aguirre used their cell phones to film and/or photograph protestors during one or more of the DN service plaza rallies. When shown photos of her holding up her phone towards a group of protesters, Aguirre intimated that she may have possibly been filming the protestors. She testified that, "Yes. That's me. That is correct. So whenever they, you know, direct my (sic) phone to me, then I do the same, but I'm not filming necessarily [emphasis added]." (Tr. 1245–1246; GC Exh. 63.) When asked if she took her own phone out to "record any of the people," she responded, "I don't remember." Then when prompted by Respondent's counsel, she changed her testimony to, "I may have raised my phone up, in response to what they were doing, because they were focusing on me, but I don't really remember exactly. And, you know, while checking my phone, I didn't make any recordings. I have nothing on my phone." (Tr. 1146–1147.)

Encarnacao testified that she told the protestors that, ". . . oh, you guys can record me, I can record you too and I did pull out my phone, but I never recorded anything." She said that she feigned videotaping the protestors because "the customers start[ed] to feel uncomfortable as well and said why are they recording, you know, so that was my—more of my concern is when the customers start to say, you know, why are you recording me because as they're actually trying to record me people are on line. So I kind of felt uncomfortable and so did my guests…So I was protecting my guests more than anything." (Tr. 917.) Respondent went to great lengths to extract this testimony to discredit Rosa and other employees who testified that these managers had been filming them during one or more of the DN service plaza actions. However, this testimony by Encarnacao and Aguirre actually supports testimony by Rosa and others that they observed them videotaping and/or or photographing the protestors. For example, lead organizer Andre Mendez, credibly testified that he observed Aguirre filming and/or taking pictures of workers on two occasions. The first was in October 2020 when Aguirre saw him meeting with workers and threatened to call the police. The second was during the November 24–25 strike when he observed her holding her cell phone up high and moving it back and forth filming the politicians, union members, former workers (Rosa and Roxanna Rodriguez) who joined the striking workers and then the next day when he returned to walk with striking employee, Maria Gonzalez, back into the DN store. (Tr. 1298–1299.) Further, Mendez testified that on November 25, Aguirre approached Rosa and told her that she should not be there and that she would call the police. He characterized Aguirre's demeanor as being "very aggressive." (Tr. 1296–1298.)[39] I find that Mendez' detailed, straightforward testimony outweighs that of Aguirre and Encarnacao.

The evidence including testimony by Encarnacao, Aguirre, and Arellano also reflects that they walked and/or stood around the DN service plaza parking area watching protests. When Aguirre was asked if she had ever walked through the DN parking area where a union demonstration was taking place in 2020, she responded, "Maybe, but I just don't remember." When shown her own photograph taken during a union demonstration on about June 11, 2020, she still responded that "Yes. Maybe" it was taken during a demonstration at the DN service plaza. When next asked if she was the woman in a picture in a purple shirt, she reluctantly admitted, "Yes. Yeah. That happened when they were, you know, saying my name, and then I put my phone and do the same." She also identified herself in several other photographs, including those with Encarnacao. In another photo with Aguirre and Arellano outside near the DN plaza entrance, Aguirre claimed not to be sure or remember if it depicted Arellano- her own supervisor with whom she interacted with on a weekly basis. I find Aguirre's evasive, equivocal, inconsistent testimony unbelievable. In other words, she is a far less credible witness than Rosa concerning her actions during the protests including telling Rosa that she should not be on the premises and acting in an aggressive manner towards her and other protestors. (Tr. 1244–1245, 1307–1308; GC Exhs. 63–64.) Moreover, based on Aguirre's overall demeanor and damaged credibility, I find that where her testimony differs from that of Rosa, Mario, Mestanza, and Vasquez, I find the Discriminatees more credible.

[39] Rosa testified that she only heard Aguirre say the word "police." However, one of the photos depicts a police officer behind the counter with Aguirre holding up her cell phone and appearing to take a picture of one of the Union members in a purple shirt. This photo discredits any testimony by Aguirre or other of Respondent's witnesses who claimed that police were never called. (GC Exh. 64.)

2. Layoffs, Recalls, Rehires

Next, Respondent's witnesses' provided conflicting testimony concerning their roles in determining which employees to layoff and/or bring back to work in May. For example, Encarnacao insisted that she received information about employee availability from Aguirre in determining which employees to recall. However, Aguirre adamantly denied that she advised Encarnacao about employee availability. Aguirre also denied that she had seen a list of employees who had been laid off in March. It is inconceivable that the general manager of the DN store would not have seen a list of employees who had been laid off. Without such a list, she would have been hard pressed to know which employees to schedule for the various shifts. It is also unbelievable that she would have memorized the names of all employees who were laid off. (Tr. 1242.)

Aguirre's testimony was not only full of inconsistencies. Incredulously, she claimed not to remember or she denied many events, even those not in dispute. Another example is that she initially responded "no" when asked if she decided who would fill in for Martin on his days off. Unbelievably, she also responded, "no" when asked if Encarnacao or Arellano made that decision. She refused to answer questions and at one point when asked about who decided who would replace Martin on his days off, said, "Okay. So those were his days off, and because he worked at a different store." Aguirre also denied having assigned her brother Leonel to fill in for Martin on most of his days off prior to the DN store's ONS reopening and continued to do so despite Respondent's own scheduling records showing otherwise. (Tr. 1163–1165.) She also blatantly denied assigning any overtime after the March layoffs when faced with her own records showing that she had in fact done so. (Tr. 1184, 1235.) As set forth above, she and Encarnacao falsely denied that any crew members received promotions to shift managers. However, the evidence overwhelmingly shows that Respondent promoted five of them, including Delia, Leonel's rumored paramour.[40] They are listed as managers on several of Respondent's documents and also received store promotional pay increases in July and by October increases in pay commensurate with shift manager's pay pursuant to the Connecticut Standard Wage Law. Aguirre even provided deceptive testimony regarding discipline of Aguirre's new employee Estrada. At first, she could not recall if she disciplined her, but when prompted by her counsel she claimed that Estrada had been mistakenly disciplined. It is unfathomable that she could not recall that Estrada received two discipline letters on two different dates serious enough to contain "last chance" language and then incredibly claim they were issued in error or to the wrong employee.[41] Therefore, Aguirre's dishonesty renders her testimony completely unbelievable. (Tr. 1239–1241; GC Exhs. 87 - 89)

[40] Delia and another, Andrea Hernandez, did not sign the two petitions, although there is evidence that Andrea Hernandez may have participated in some of the rallies or protests. Respondent also promoted Neica Lafleur, Elma Vasquez and David Martinez, who did sign one or more of the petitions and participated in some Union activity. Nevertheless, Respondent's witnesses went out of their way to misrepresent and provide false testimony concerning their actions. (GC Exh. 57; R. Exh. 9, 10, 13)

[41] It is no surprise that Aguirre could not recall the employees whom she claimed were actually disciplined.

Both Aguirre and Encarnacao offered contrasting testimony regarding the October reopening of the DN store. First, Aguirre testified that when the ONS reopened it was staffed with one shift manager and one crew member who began working at 8 or 9 p.m. until 3 or 4 a.m. She explained on cross-examination that "Okay. So the only position for Shift Manager was the one from 4:00 a.m. to 12:00 noon…[t]he other one from 8:00 p.m. to 4:00 a.m. is a crew trainer…" She then claimed that she always the acting shift manager between 12 a.m. and 4 a.m. Each time that the General Counsel asked the question, Aguirre changed her testimony. Next, she said she was "not necessarily" present from 12:00 midnight to 4:00 but "You know, sometimes—I have an open schedule. So sometimes I would stay until 5, 6 or any time, to check on the business." Next, she said she only did this "at the beginning, to check on the transactions of the business." Thus, Aguirre's testimony was all over the place- first she covered from 4–12 noon, then she covered until 5 or 6 or anytime and then she only covered in the beginning of the shift. Then, she claimed she could not remember anything. (Tr. 1211–1213.) When asked if Jason Lima, an ONS manager from another store covered during the ONS at DN 2 days the week of January 11, 2021, she responded, "No. That's not the case," but yet went on to state, "I put out a call to get a supervisor…he was sent to work the store for only a few hours." However, the evidence showed that he worked 2 days. (Tr. 1213–1216.)

Based on the credited evidence, I have already determined that five crew members were promoted and received shift manager pay only surpassing that of Mario and Mestanza (when they were terminated) by $.25 as of September 2020. (Tr. 1211–1213.) Further, Lila confirmed that the abbreviation "A" on her own weekly scheduling reports denoted administration work such as counting and depositing cash performed only by shift managers. However, in almost the same breath, when asked if only a shift manager would have an "A" next to their name, she responded, "Not necessarily." Then when asked what other position would be responsible for performing these same duties, she replied, "Only the Shift Manager." (Tr. 1182.)

Encarnacao also attempted to downplay the reinstatement of the ONS without Mario or Rosa. She insisted that "actually we don't have an overnight shift anymore" even when they reopened the DN ONS in October. She claimed this because they kept Martin on to work in the kitchen and rotated in a shift manager. She stated that instead of having someone come in from midnight to 8 a.m., they had them work from 8 p.m. until 4 a.m. and then have the opening shift manager start at 4 a.m. Although the ONS may have been reduced to two people, Respondent still paid a shift manager to work those same hours that Mario and Rosa worked. In other words, Respondent continued to avoid bringing back at least one of them or offering them an opportunity to come back to work the ONS or another shift. By the time the ONS reopened, all shift managers including the newly promoted ones were making $16.25 an hour, more than Rosa made when she was laid off and only $.25 less than Mario made (GC Exh. 57.) Therefore, Respondent would not have saved money or lost more by returning Mario or Rosa to the ONS, which by the way did exist as of October 5.

Given the blatant inconsistencies and contradictions in the testimony of Respondent's witnesses (not just Aguirre) about main points and events, I find that where their testimony contravenes that of the discriminatees,' I credit that of the discriminatees. In summary, I find that Respondent and its witnesses knew or should have known of the greater levels of union participation and organizing leadership by Rosa and Mario. I further find that Encarnacao, Aguirre, and Arellano kept careful watch of the DN plaza union activity, that Aguirre warned

Rosa against being on the premises after her layoff and that she and Encarnacao photographed and or filmed protestors on at least one or two occasions. In addition, I credit Mestanza and Vasquez' testimony over that of Aguirre's that Aguirre not only disparaged the Union but discouraged their and other employees' participation. I do not believe, contrary to Encarnacao's contentions that Vasquez and Mestanza calmly accepted and even welcomed their layoffs.[42] Nor do I find that Rosa, Mario, and Mestanza told Encarnacao or any other manager that they were unavailable to work other shifts in the time leading up to, during or after their layoffs. They certainly did not credibly offer this as a reason for not bringing them back to work.

I also discredit for reasons stated Aguirre's denial that neither Mestanza nor Vasquez warned her about the relationship between her brother Leonel and Delia and how it might affect the workplace. Vasquez admitted that, "Yes. Probably I didn't tell her [Counsel Garry] that when I was doing this statement. But it is the truth. Lila spoke with me when we had that coffee and then later on during our worktime she would mention it." She explained further that, "Yes. I did speak to [Aguirre]. . . perhaps not in the moment of this declaration but at other times I have spoken with Ms. Garry about the way that the union was spoken of." When challenged on the veracity of her testimony, Vasquez insisted that "Nobody has to tell me what to say, to instruct me. I am saying what I experienced." She further testified that she "did tell Ms. Meredith [Garry] about that and I don't know why it's not in the—in this document, but I did tell her." (Tr. 539–541, 546–547.) On redirect, she reiterated that she and Ms. Garry continued speaking and she continued to provide her with additional information which does not appear in the statement and Ms. Garry did not send her a revised or supplemental affidavit. (Tr. 557–558.) The fact that Vasquez admitted that Aguirre never threatened that she would lose her job due to her union participation lends credence to her testimony. (Tr. 548–549.)

3. The General Counsel's witnesses

Regarding the General Counsel's witnesses, although there were some inconsistencies in their testimony and statements, they did not reach the level or degree of unbelievability as did that of Respondent's witnesses. Respondent challenges union organizer Reyes' testimony regarding his knowledge of employee support of the Union but there is no dispute by the General Counsel that other of Respondent's DN employees who were either laid off and returned or not laid off participated in union rallies and petitions. In fact, Reyes testified that Elma Vasquez and Besly Paul had also given interviews. (Tr. 309–311.)[43] Nevertheless, the overwhelming credible evidence reveals that Union support, participation and subjects of media attention of and by Mario and Rosa significantly surpassed that of any other former and current DN store employees. In fact, Mario and Rosa led and became the face of DN plaza unionization efforts.

Respondent challenged Mario's credibility on several points. For example, when asked if he received some raises in 2019 and 2020, Mario responded "Yes, raises that I never saw in 26 years." When asked about raises he in fact received on July 18, 2018, in connection with a performance review, Mario responded, "That raise was because of insisting so much." When

[42] Arellano did not corroborate Encarnacao's testimony that they were fine with the layoffs. (Tr. 1100–1101.)

[43] Reyes pointed out that Besly Paul had since been terminated from the DN store in about the latter part of 2020. (Tr. 311.)

asked if he had not just provided incorrect testimony, Mario replied, "I didn't say I received no raises in 26. Those raises were like pennies. . . the last two raises that you referred to I. . . I had never seen a raise that large before." Respondent's documentation shows that Mario received a $1 raise in 2018 and a total of $2.65 in 2019. Thus, consistent with Mario's testimony that he received more than he had received in many years. Of note, the last increase, documented by Respondent as an across the board "company adjustment," came within a week of employees delivering the first petition to Respondent's headquarters in 2019. (Tr. 483–484; R. Exh. 57.)

Respondent contended that Mario had not been involved in any union activity between December 2019 and June 11, 2020, is a misrepresentation of the evidence. Mario did in fact attend a rally at the Capitol in January 2020. (Tr. 400.) Rosa on the other hand, testified that she did not participate in any rallies or demonstrations between December 18, 2019 when she delivered the first petition to Respondent's headquarters office and a rally in April or May 2020 because "that's when the pandemic was starting." (Tr. 400). Respondent's counsel challenged that testimony asking if she had previously stated that she had not participated in any union events in April 2020. She insisted that she "did caravans with the cars, we used our car horns. . . in April, April/June; no, not July, September." A review of the record confirms that she did participate in an April car caravan demanding "PPE and sick days because of COVID." (Tr. 401–402, 352–353; GC Exh. 38.) In fact, several of her comments made during this rally were reported by one of the news outlets. (Tr. 252–353; GC Exhs. 23, 30, 38.) Nevertheless, Mario and Rosa participated in union events both before and after the layoffs and were not returned to work. Regarding Mario's testimony that he had not told anyone he had a day job and had not worked days right before the layoffs, Aguirre confirmed that she did not have knowledge that he worked right before the layoffs and that she did not share this with the decision maker, Encarnacao. In fact, Aguirre admitted that "[e]verybody has another job." (Tr. 1136–1139.) Aguirre also testified that Mario at one time told her he worked in housekeeping and that Rosa cared for "an elderly lady," but other evidence offered by Respondent indicated that they worked other types of jobs. Again, there is no corroboration that either Mario or Rosa, when notified of their layoffs in March, told Encarnacao that they could not receive unemployment because they worked day jobs.

Regarding Rosa, I find that evidence that in 2015 that she requested to have weekends off but did not request to work days does not support testimony that she was not available to work other shifts or days. On rebuttal, Rosa provided evidence that she had in October 2019 presented Aguirre with a doctor's note requesting to change shifts. (GC Exh. 86.) Rosa testified that she gave Aguirre the note in a sealed envelope and that Aguirre went into her office and returned to tell her "that my shift was an overnight shift. That I had applied for an overnight shift." (Tr. 1268–1269.) Aguirre denied ever seeing this note from Rosa's doctor. (Tr. 1219.) I give no weight to this October 3, 2019 note which stated, "Mrs. Franco, Rosa must change her work shift due to medical condition." The note is too vague and does not indicate or recommend which shift Rosa should have been transferred to. This does not, however, dispel the fact that Respondent never sought information about Rosa's (or any of the discriminatees') availability to work post pandemic. Nor does it diminish Rosa's credibility overall.

Martin Huamani attended rallies and demonstrations, signed petitions and accompanied Mario to deliver the wage petition in December 2019 but was kept on in March after the elimination of the night shift. (Tr. 485–486.) Mario acknowledged that Martin was kept on to

"do the maintenance overnight. . . [t]hey probably changed, because he was a cook" (Id.) However, as stated, Martin's participation did not rise to the level of Mario's or Rosa's, and the credited evidence reveals that Respondent did in fact (through Arellano) attempt to recall the other two ONS crew members who were laid off in March but was unable to reach them. It is interesting as well that according to Aguirre, Respondent kept Martin on and permitted him to continue with his 2 days off so that he could work his other job. (Tr. 1163–1165.) Further, Martin was not the lowest paid crew member and Vasquez clearly was not the highest or one of the highest paid crew members. There is no evidence that Vasquez was offered to work another shift or another area in the restaurant in lieu of permanent termination.

Encarnacao provided several reasons as to how she decided which employees to layoff and return to the DN store. She testified that she laid off the highest paid shift managers and same day shift crew and likewise decided to return the lowest paid shift managers and crew. She also testified that she did not return any of the ONS managers or crew members because the shift was still suspended. Next, she testified that she consulted with Aguirre to determine employees' availability to work various shifts and in all areas of the store. (Tr. 924–925, 936, 942, 946.) First, I have discredited Encarnacao's after the fact assertion that she considered availability. Next, as set forth above, Mario and Mestanza were not the highest paid shift managers (Lorenza Huamani was) and Mestanza worked a flex shift as did other managers.[44]

Encarnacao allegedly told Aguirre that she was keeping Marin Huamani on because he was a crew person who worked a lower hourly rate than some of the other people on the ONS. However, Martin made $.50 more than Vasquez and other crew members. There was no evidence that Martin was the only crew member who could have watched the ONS between March and October or that he was the only crew member who could have performed basic maintenance which could only have included cleaning (which all employees did to some extent) since there was no business going on prior to October. Further after the ONS reopened in October, Martin resumed his prior kitchen only duties while apparently the shift manager manned the drive-thru. Certainly, if Encarnacao wanted a lower wage crew member to watch the store (before October 5), clean the store (before and after October 5) and work the grill (after October 5), then Vasquez would have been the best choice for the job. (Tr. 1134–1135; R. Exh. 10.)

Although one of the exhibits provided by Respondent (R. Exh. 13) reflects Mestanza as being a full-time morning employee (GC Exh. 76), Respondent's Exhibit7 and General Counsel Exhibit 76 (provided by Respondent) shows her as a full-time afternoon manager. Unrebutted testimony shows that Mestanza worked actually worked mornings a couple of days, afternoons a couple of days and as needed on weekends. (Tr. 576.) Regarding Encarnacao's misrepresentation that Mestanza was okay with not being returned to work in May because she had to care for her sick father, I credit Mestanza's version of the conversation. Mestanza testified that when Encarnacao called her 2 days after she had left a message for Tyrone Davis in May to see when she could return to work, "[she] was happy that she called…because I thought

[44] Lorenza Huamani, who was not laid off and made the highest wage, did not sign either of the petitions. (R. Exhs. 9, 10.) Nor was there evidence that he openly supported the Union. Although he was labeled as a part-time shift manager, he mostly worked 7–8 hours a day with 2 days off which was a similar schedule as full-time managers. (GC Exh. 73.)

they were going to call me back to work, but it wasn't that way. She asked me how I was. I said I'm very bad. That I really needed money. That my father was sick with cancer." On cross-examination, Mestanza explained that her father lived with her and that although he was at home recovering March through June, from a January laser surgery, "[h]e could walk. He could do everything for himself. The only thing is that he needed his medicines, and we didn't have money to buy his medicines." Mestanza denied telling Encarnacao that not being recalled would give her an opportunity to be at home to care for her father. Mestanza's testimony is more credible here since she worked from January through her layoff full time as a manager at the DN store without complaint or even evidence of significant time off to care for her father. (Tr. 593, 605–607.)

III. **Discussion and Analysis**

A. Legal Standards

Section 8(a)(1) prohibits an employer from taking adverse actions because the employee engaged in protected concerted activities. Section 8(a)(3) makes it an unfair labor practice to "[discriminate] in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." Therefore, an employer who retaliates against employees because of their union activity to discourage other employees from engaging in such activity violates Section 8(a)(3) and (1) of the Act. The standard for evaluating whether an employer's adverse employment action violates Section 8(a)(1) and/or (3) is generally set forth in *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). To support a finding of discriminatory motivation based on union or other protected activity under *Wright Line*, the General Counsel has the initial burden to prove: (1) the employee engaged in union or other protected activity; (2) the employer knew of such activity; (3) the employer harbored animosity/animus towards the union or other protected activity; and (4) with sufficient evidence, there was a causal connection between the adverse action and the protected activity. See *General Motors LLC*, 369 No. 127, slip op. at 10 (2020); *Tschiggfrie Properties, Ltd*., 368 NLRB No. 120, slip op.at 1 (2019); *Mondelez Global, LLC*, 369 NLRB No. 46, slip op. 1–2 (2020); *Electrolux Home Products*, 368 NLRB No. 34, slip op. at 2–3 (2019).

To support its initial burden under *Wright Line*, "the General Counsel must prove by a preponderance of the evidence that union animus was a substantial or motivating factor in the adverse employment action." *Consolidated Bus Transit, Inc*., 350 NLRB 1064, 1065 (2007), enfd. 577 F.3d 467 (2d Cir. 2009). In other words, the General Counsel "does not invariably sustain his burden of proof under Wright Line whenever, in addition to protected activity and knowledge thereof, the record contains any evidence of the employer's animus or hostility toward union or other protected activity." Tschiggfrie Properties, above, at slip op. at 7 (emphasis in original). However, unlawful motivation may be inferred from direct and circumstantial evidence. *NLRB v. RELCO Locomotives, Inc.*, 734 F.3d 764, 780 (8th Cir. 2013) (internal quotations omitted). Circumstantial evidence of discriminatory motivation may include several factors, including pretextual or shifting reasons for the adverse employment action, suspicious timing between an employee's protected activities and the discharge, disparate treatment of employees and failure to adequately investigate alleged misconduct. *Temp Masters,*

Inc., 344 NLRB 1188, 1193 (2005); 40 *Promedica Health Systems, Inc*., 343 NLRB 1351, 1361 (2004); *One Medic, Inc*., 331 NLRB 464, 475 (2000).

If the General Counsel meets this initial hurdle, the burden shifts to the employer to demonstrate by a preponderance of the evidence that it would have taken the same action even in the absence of the protected conduct. See *Wright Line*, above at 1089; *General Motors*, above; *Electrolux Home Products*, above at slip op. at 3; *Shamrock Foods Co.,* 366 NLRB No. 117, slip op. at 26–27 (2018). The General Counsel may offer proof that those articulated reasons are false or pretextual. When an employer's stated reasons are pretextual, discriminatory motive may be inferred but not compelled. In other words, a trier of fact can infer that the motive is an unlawful one that the employer attempts to conceal where the facts tend reinforce that inference. See *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966).

B. The General Counsel Established a Prima Facie Case

1. Discriminatees engaged in protected activity

Section 7 of the Act protects the right of employees to engage in "concerted activity" for the purpose of collective bargaining or other mutual aid or protection. For an employer's actions to be "concerted" the employee must be engaged with or on the authority of other employees and not solely on behalf of the employee him or herself. *Meyers Industries (Meyers I)*, 268 NLRB 493 (1984), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), on remand *Meyers Industries (Meyers II)*, 281 NLRB 882 (1986), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). The question of whether an employee has engaged in concerted activity is a factual one based on the totality of the circumstances. *National Specialties Installations, Inc.*, 344 NLRB 191, 196 (2005). The Act protects discussions between two or more employees concerning their terms and conditions of employment. Whether an employee's activity is concerted depends on the way the employee's actions may be linked to those of his coworkers. *Fresh & Easy Neighborhood Market*, 361 NLRB 151, 153 (2014). Concertedness is analyzed under an objective standard. *Fresh & Easy Neighborhood Market*, supra at 154.

The General Counsel easily establishes that all discriminatees engaged in protected activity. The record is replete with examples of them participating in multiple rallies and protests in support of the Union and also in protest against Respondent's unfair treatment concerning wages, safety and other terms and conditions of employment. The record also shows that the discriminatees engaged in such activity before and after the March layoffs and May reinstatements of laid off employees. Moreover, the evidence establishes as shown above that Mario and Rosa not only heavily engaged in Union and other protected activity but led employee efforts to unionize. Therefore, their degree of participation far surpassed that of other employees. As such, comments of both Rosa and Mario during rallies and in interviews to the press included concerns shared by Respondent's employees. This was evident by the support garnered among Respondent's employees.

Although I find that Mestanza's and Vasquez' union support did not reach the level of that of Mario and Rosa and perhaps even other employees who were not laid off or were laid off and returned to work or offered recall, I find that they did join in several rallies and also signed

both petitions. Moreover, they both challenged what they believed to be preferential treatment shown by Aguirre towards her brother, Leonel, and Delia. First, I credited their testimony over Aguirre's and found they essentially warned Aguirre about the store rumors surrounding a romantic relationship with the relatively new then crew member, Delia. Their warnings to Aguirre in late 2019 in particular and then later by Mestanza when she cautioned Aguirre not to put Leonel and Delia on the same shift fell upon deaf ears. I have found that Mestanza and Vasquez made it clear to Aguirre that employees were talking and that the romantic involvement could lead to problems since Leonel's wife was a recent coworker. Any question about the concertedness of their complaints is dispelled by the fact that Mestanza had no personal-only stake in warning Aguirre about the relationship between Leonel and the newer crew member Delia and advising of the potential issues it would cause among employees. Moreover, Vasquez further objected to perceived favoritism toward Leonel and his love interest in the March lay off meeting. She openly questioned the favoritism and unfairness of Respondent letting more senior employees go while more recent hires were kept on. She specifically complained as an example how Leonel and Delia had been receiving more work hours than others and admonished that they should check the employee time punch cards. In addition, I find Aguirre and Encarnacao's overt attempts to hide the truth about giving "company" raises to and promoting four employees including Delia rather than recalling any of the four discriminatees further supports Mestanza's and Vasquez' concerted efforts to thwart management's actions. In summary, I find that the safety, favoritism, employee morale and other work concerns raised by Mestanza and Vasquez to Aguirre clearly fall within the scope of employment terms and conditions protected by the Act. See e.g., *Dreis & Krump Mfg.*, 221 NLRB 309, 314 (1975).

The Board has held that complaints of favoritism and unfairness in making assignments in an effort to change working conditions for all employees when made to management constitute protected concerted activity. See *Rock Valley Trucking Co.*, 350 NLRB 69, 83 (2007); *North Carolina License Plate Agency #18*, 346 NLRB 293 (2006). There is no requirement that an employee bring such issues to management "in a formal agency sense to act as group spokesperson for group complaints" in order for the activity to be protected and concerted pursuant to the Act. *Herbert F. Darling, Inc.*, 287 NLRB 1356, 1360 (1988). Further, the Board has found protected activity to be concerted when it is the "logical outgrowth" of concerns raised by a group of employees or even when one employee decides to raise the issue with the employer on behalf of the interests of the group. See *Hitachi Capital America Corp.*, 361 NLRB 123, 138–139 (2014) (citing *Mike Yurosek & Sons, Inc.*, 306 NLRB 1037, 1038 (1992).

2. Respondent was aware of protected activity

I find that Respondent was aware of discriminatees' protected Union organizing and protest activity. I will not repeat my credibility findings here which support my determination that Respondent and its managers were well aware of protected Union and other concerted activity by the four discriminatees. Clearly, they kept track of and were aware of various union rallies, events and press releases which included quotations and even photographs of Mario and Rosa.

Even Respondent's headquarters personnel recognized Mario and Rosa and others when they hand delivered one or both of the petitions in 2019 and 2020. In addition, based on credited testimony, Aguirre made it known that she was aware of signatures being taken, and Mario

openly discussed the Union and collected signatures in the DN plaza parking area.[45] I completely discount Encarnacao's testimony that she could not have known all the employees when she received emails from her superiors and McDonald's public relations containing articles about union activity and featuring Mario and or Rosa. Mario met with the union organizers early on and led the movement to talk to his coworkers openly at the DN plaza both day and night and to collect signatures on both of the above described petitions in 2019 and 2020. He also led the groups who delivered the petitions to Respondent's headquarters in December 2019 and later in 2020. Both Mario and Rosa were featured on the Union's public website and Twitter page and Mario's quotation was featured in the Union's March 27 press release later broadcast by local news outlets, online and print. These are a few of the examples discussed above in this decision, some of which were sent to McDonald's corporation and filtered down to Respondent's owner, Michell, as well as managers Davis, Cukurs, and Encarnacao. Respondent clearly surveilled the Union activities overall and in particular those which occurred at the DN plaza. Respondent received "The immigrant heart of historic McDonald's union drive" in the Connecticut Post prominently depicting photos of Mario and Rosa and including an article featuring Rosa's interview. These press releases and articles often mentioned they were employees from the DN store.

Finally, I have credited Mestanza's and Vasquez' testimony regarding their protected activity by forewarning Aguirre of favoritism and potential safety and poor work conditions due to the romantic liaison between Leonel and Delia. In addition, Respondent would have been aware of their signatures on the two petitions supporting the Union and protesting their permanent layoffs and poor working conditions and wages. Mestanza and Vasquez were also present at several of the union rallies and Mestanza joined in delivering the June 2020 petition to Respondent's headquarters office. They were also chastised for supporting the Union by Aguirre in 2019 and 2020. Finally, there is overwhelming evidence of Aguirre and Encarnacao observing the discriminatees at various rallies and filming them with their cell phones. Therefore, there is no doubt that Respondent was well aware of Mario's, Rosa's, Mestanza's and Vasquez' protected activity.

[45] Aguirre was present at the DN store on a daily basis; Arellano was there several times a week; and Encarnacao was there on an almost weekly basis. Although Encarnacao claimed she only came and went through the drive through and chatted with Aguirre and/or Arellano, the store is small and she certainly was present in the parking lot and inside the store taking videos and photos of protestors including Rosa. Further, Mario collected signatures not only at night but also during the daytime in plain view from many of his coworkers in 2019 and former coworkers in 2020. I find it unbelievable that Aguirre, Arellano, and Encarnacao were unaware of this open activity. See *Roemer Industries, Inc.*, 367 NLRB No. 133, slip op. at 22 (2019) (citing *NLRB V. Mid State Sportswear, Inc.*, 412 F.2d 537, 540 (5th Cir. 1969) ("when the facility is small and open, the work force is small, the employees make no great effort to conceal their union activities, and management personnel are located in the immediate vicinity of the protected activity, which increases the likelihood of knowledge.")

4. Animus

a. Direct Animus

Respondent insists that it neither had nor expressed animus against the Union or union or other protected activity engaged in by its employees. Respondent argues that the General Counsel has not met its burden because its witnesses denied having animus; it handled its unchallenged layoffs in the same manner in which it decided to recall employees; it doled out raises to its employees after they began supporting the Union in 2019 and protested against work conditions in 2019 and 2020; and it did not punish or discipline employees, including the discriminatees, after they began to engage in union activity in 2019. Respondent primarily argues that it did not discriminate against the discriminatees because they either never laid off or recalled many of its employees who engaged in protected activity. However, I find based on the totality of the circumstances, including the almost complete unreliability of Respondent's witnesses, that their arguments are without merit and that their reasons for its actions are based on pretext.

In early 2019, Aguirre expressed her disdain for the Union and warned Vasquez and Mestanza that she knew the Union was in the plaza and that signatures were being collected. She even warned that the Union "wasn't good for any of [the employees]" and that "if [employees] accepted to be in the Union, [they] would have a lot of problems." (Tr. 578–579.) She cautioned that employees should focus on work instead of gossiping about a romance between her brother and Delia and getting involved with a union that took employees' money and did nothing. Subsequently, Vasquez and Mestanza witnessed Aguirre disparage the Union (in a loud, shouting tone) to workers inside the DN store kitchen on several occasions. (Tr. 581.) Aguirre also admonished Vasquez for signing a petition in support of the Union without consulting her first. (Tr. 517.)

In addition, during several of the Union's rallies and protests at the DN plaza, Aguirre, Encarnacao, and Arellano walked around the parking area observing and appearing to photograph or video tape the protestors. The evidence shows photos of both Encarnacao and Aguirre in the DN plaza parking and also inside the DN store behind and in front of the counter filming employees and Union members during events. There is even a photo of them boldly standing next to a police officer behind the DN store counter while holding up their cell phones to film protestors and a Union official. The Board has found that similar conduct by employers constitutes "more than mere [lawful] observation…because such pictorial recordkeeping tends to create fear among employees of future reprisals." *Harco Asphalt Paving*, *Inc.*, 353 NLRB 661, 666 (2008). I have also credited testimony that Aguirre threatened to call the police on at least one occasion when Rosa along with Union representatives accompanied a former coworker back into the plaza following one of the 2020 strikes. Although Rosa only heard the word, "police," other testimony and the photo of the police officer inside the DN store supports testimony that the threat was indeed made.

Moreover, as discussed at length above, Respondent kept careful track and received alerts in 2019 and 2020 from McDonald's corporate communications team and others of union activity at the DN plaza. Respondent even broadcast some of the union events and media coverage thereof inside its DN and other stores. Although there were no overt threats in the

various emails funneled down to George Michell, Cukurs, Davis and Encarnacao, it is clear that Respondent maintained regular and open surveillance of and collected "intel" on the Union's and the employees' activities. One advisory for example informed Respondent that "[f]ood service workers at McDonalds Darien Northbound" were slated to speak. (GC Exh. 47, pp. 1-2) A number of the emails collected by Respondent included press releases and advisories featuring photos of Rosa and Mario and quotations from their interviews. Both Rosa and Mario spoke out against what they believed to be unfair treatment of employees regarding wages and poor working conditions. They talked about their beliefs that Respondent used the pandemic as an excuse to "get rid of [the] entire night shift, which had some of the most experienced workers in the store, just because [they] demanded fair treatment." (Tr. 355; GC Exhs. 31-32, 39, 52) Mario loudly proclaimed in April 2020 that Respondent had laid "us" off without giving them "an opportunity to move shifts or giving [them] at least a day of work." (GC Exh. 20, p.3)

b. Pretext

As stated above, unlawful motivation may be inferred from several factors including pretextual and shifting reasons given for the employer's adverse action, inconsistent or discriminatory treatment of employees and timing between an employee's protected activities and the adverse treatment (in this case failure to return from layoff). Animus must be shown to be a substantial and motivating factor for the adverse action and be proven by the preponderance of the evidence. On its face, the economic plight resulting from the pandemic may appear to be a reasonable justification for not returning the discriminatees to work in May. However, I find that Respondent ceased upon it as a pretext and cover for retaliating against the discriminatees for engaging in Union and other protected activity in violation of the Act.

First, misrepresentations and untruths about knowledge and scrutiny of union activity including that of Rosa's and Mario's and their support and leadership in the union movement raise grave concerns about Respondent's motives and veracity on other matters. Second, Encarnacao's, Aguirre's, and Arellano's testimony that there were no promotions at the DN store since the pandemic is entirely implausible given the scheduling and pay rate records provided by Respondent. It is similarly incredible that Respondent's own records incorrectly reflected that it gave company pay raises and promoted five of its then crew members, including Leonel's rumored paramour, Delia, to shift manager positions between May and September 1. Respondent not only called them shift or swing managers in company records, by September 1, they received the same wage rate of $16.25 as did all other shift managers at the DN store.

Next, regarding Rosa, Respondent asserted that one of the several reasons it did not return Rosa was because she was one of the highest paid managers. This assertion is patently false as Respondent's records show that six other shift managers made $15.50 per hour, all of whom were returned to work or never laid off. (R. Exh. 10.) Similarly, Respondent claimed that it laid off and never returned Mario and Mestanza because they were the highest paid managers or department managers. However, between March 1 and September 4, there were two other department managers (Werner Corado at $16.50 and Lorenza Huamani at $17) who made the same or more than Mario and Mestanza. (Id.) Moreover, as pointed out earlier in this decision, Encarnacao admitted that she knew as early as May the dates and amounts of pay raises that would be due all employees including shift managers under the Connecticut Standard Wage Law. Therefore, she knew or should have known that Rosa's pay rate would continue to be the

same as many of the other shift managers. Using Lorenza Huamani as a similar example, Encarnacao knew or should have known that Mario's and Mestanza's pay rates would have remained the same at $16.50 or at most increased by only $.50. In fact, management had control over how they calculated and manipulated employees' pay after the standard wages went into effect.

Next, Encarnacao's and Aguirre's testimony regarding the availability of Rosa and Mario to work another shift or different hours was wholly incredible and what I find to have been a falsehood made up after the underlying charge and complaint were filed. Encarnacao claimed to have used availability information received from Aguirre as Aguirre vehemently denied providing Encarnacao with any information whatsoever. Encarnacao also testified that both Mario and Rosa declined unemployment information telling her that they had other jobs. I credit Rosa's and Mario's testimony that they never told Encarnacao that they worked other jobs. Further, the record reflects that Aguirre had not had a discussion with either Mario or Rosa about their outside work in 2020. It is especially telling that Aguirre volunteered that, "everybody has another job, Okay?" (Tr. 1137) If everyone had another job presumably when they were not working on their regular shifts the justification that they were available to work any shift is simply not credible. Even if both had other work or day jobs, the credited evidence does not show that either was unavailable to work another shift in March, May or thereafter. Moreover, Respondent attempted to offer the other DN nightshift employees positions as early as May or June but could not reach them.

Respondent did not include in either of its position statements information about Mario's and Rosa's purported unavailability for other shifts as a reason for not returning them to work. I find this along with the unreliability of Respondent's witnesses on so many vital points further undermines Respondent's credibility. See *Pressroom Cleaners*, 361 NLRB 643, 673 (2014) (upholding the discrediting of respondent's explanation for refusal to hire based on credited testimony inconsistent with respondent's position statement). Respondent also stated that "the overnight shift, where sales have been impacted most, layoffs must regrettably continue since the restaurant is still not open for business during those hours." In her attached affidavit, Cukurs claimed only "several" laid off employees were recalled and that they were not able to recall 8 of the 19 laid off. Again, this is patently false when reviewed against the credited testimony and evidence. First, there was no evidence of layoffs from the ONS at the DN store after March and in fact, there were three new hires two of which were kept on until at least the end of 2020 and five promotions from crew members to shift managers. Cukurs further misrepresented Respondent's position by stating that it was their intention to recall the remainder of the laid off employees when business improved. To date or at least at the time of the conclusion of the hearing in this case, none of the discriminatees were recalled despite Respondent's stores reopening post pandemic and the ONS reopening in October 2020. (GC Exh. 53.) In the September 9 position statement, Respondent reported that Aguirre had indicated there were three "manager trainees" attending classes and that Encarnacao reported they had been in training since 2019 well before the pandemic began. Respondent further wrote that, "Ms. Encarnacao would make these personnel decisions and she currently has no plans to promote any of these individuals to "managers" since no need exists and other "managers" are still on furlough." (GC Exh. 54.) Once again, Respondent has created falsehoods to cover the fact supported by its own records that not only three but five of its former crew members who may or may not have been in training pre-pandemic were promoted and labeled as shift managers and paid accordingly

between May and September 1. Moreover, Encarnacao admitted that Arellano attempted to call both Roxanna Rodriguez and Portillo who regularly worked the ONS as well to offer them recall on May 11 and 12. (Tr. 1024–1025.) Therefore, the credited evidence clearly shows that the only employees that Respondent never called back or attempted to call back to work were the four discriminatees.

In addition, Respondent hired three new employees to cover the summer rush during the same time period that it brought back most of its laid off employees. Although they were hired to work part-time and various shifts, during the busier summer season, they often worked over 35 hours a week and one of them worked only in the kitchen for several months (another fact supported by the evidence but denied by Respondent's witnesses). At no time did Respondent reach out to Rosa or Mario or the other two discriminatees to inquire as to their availability or ask whether they would be willing to work fewer hours or on other shifts. Encarnacao asserted that it would have been embarrassing to them and not make good business sense to offer them fewer hours or demote them from their shift manager positions or pay rates. It would not have been unreasonable or bad business sense to at least offer your more tenured employees an opportunity to return to work making the same or even a lower wage until things turned around in September when Respondent apparently reached some level where it was fiscally feasible to hire new employees and promote five crew members to shift management positions making almost the same wage rate as Mario and Mestanza when they were laid off. It is remarkable that Respondent singled out Rosa, Mario, Vasquez, and Mestanza among all those who were laid off in March and did not even attempt to recall them in May or June or even October when the ONS reopened.

Another example of Respondent's pretextual coverup was Respondent's attempt to justify its decision to not recall Rosa due to her availability with a request she made back in 2015 to be off on weekends. Rosa's 2015 request to be off on weekends is irrelevant to Respondent's failure to bring her back to work in May 2020. (R. Exh. 8.) It is clear that Respondent's managers devised a plan to coverup its real, discriminatory reasons for not recalling or attempting to recall the discriminatees. Although I have gave no weight to Rosa's October 2019 doctor's note requesting that she be reassigned, it does not negate the fact that Respondent never inquired about Rosa's or any of the other discriminatees' availability at the critical point in time when they were attempting to reinstate employees. Respondent also attempted to return or returned all of the DS and Fairfield store employees in May or June (with the exception of one employee), including managers and crew members who worked the ONS. Encarnacao's testimony that she made this decision because those stores were much smaller with fewer employees does not ring true against all of the other evidence.

Similarly, Respondent's reasons for not recalling Mestanza and Vasquez are equally pretextual. Mestanza who not only worked for Respondent over twenty years, was a manager with a great performance record who like Mario and Rosa could work in any area of the DN store performing managerial and crew duties. In addition, she was not as alleged by Respondent the highest paid manager at the DN store nor was she one who only worked one shift.

Encarnacao testified that during the meeting where she laid off Mestanza, Mestanza replied that she would just have to "eat rice and beans for dinner." If Mestanza made this statement, it is incredulous that she (Mestanza) would almost in the same breath exclaim that she

understood the layoff and that it was "fine." (Tr. 928.) Encarnacao then claimed that when she called Mestanza in May, Mestanza, who supposedly had complained about having to eat rice and beans, suddenly told her that the layoff "couldn't have been a [sic] better point in my life because my dad is in the hospital and he's very, very ill." (Tr. 941.) Encarnacao's version of conversations with Mestanza are false as it is more believable that Mestanza, who had been working morning and afternoon shifts, full-time, since her father's cancer surgery in January, told Encarnacao that she needed her job and the money to continue to pay for his medications.

Further, Respondent has completely failed to credibly explain how Encarnacao discovered Vasquez' availability or whether she spoke English or whether she wanted to stay in the kitchen area. There is no evidence she obtained this information from Aguirre as she denied discussing any of the employees with Encarnacao and Arellano as to who should be laid off and returned. (Tr. 1092, 1242–1243.) In fact, the only light shed on this matter by the evidence is that this information was related after the fact in an attempt to bolster Respondent's case. Although Vasquez admitted that she had declined opportunity in the past to work outside the kitchen because she preferred not to work with customers, no one had shared this information with Encarnacao. Moreover, when Vasquez was presented with that opportunity in the past, she was not facing a layoff and her job was not dependent upon her response.

C. Respondent Fails to Meet its Burden of Proof

I find that Respondent has failed for reasons previously set forth to meet its burden of showing that by the preponderance of the evidence it would have not recalled the discriminatees absent their credited protected activity. All of its defenses have proven to be without merit; even those not specifically mentioned herein have been considered and rejected based on the totality of the evidence. Respondent argues that it recalled many employees who also engaged in protected activity, which is true. However, as shown, no other employee's level of Union and other protected activity reached the levels of the four discriminatees. I agree with the General Counsel that naturally Respondent could not have afforded to permanently let go or target all 28 of its approximate 43 or so employees who signed the petitions or even those who engaged in rallies and protests. The Board has established that "the discriminatory discharge of one employee may have and have been intended to have a suppressive effect on all employees' protected activity." In other words, "discriminatory intent or conduct is not negated simply because all union supporters are not targeted." *Pacific Design Center*, above at 415 (citing *Handicabs, Inc.,* 318 NLRB 890, 897–898 (1995), enfd. 95 F.3d 681 (5th Cir. 1996)). Regarding Respondent's opening argument that the Board should provide it deference to its business judgment given the extraordinary and unprecedented effects of the pandemic, there is no record that the Board has provided any such deference or otherwise waived an employer's obligation under the Act.

Here, Respondent's articulated reasons have been proven to be false and a mere pretext to cover its scheme to use the pandemic layoffs as an excuse to terminate the discriminatees. Therefore, I find that Respondent violated the Act when it failed to recall the four discriminatees.

CONCLUSIONS OF LAW

1. Respondent violated Section 8(a)(3) and (1) of the Act when after March 2020 it

failed to reinstate or recall from layoff employees Mario Franco, Rosa Franco, Pilar Mestanza, and Milagros Vasquez.

2. Respondent is an employer who has engaged in the above stated unfair labor practices affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

3. The Union is a labor organization within the meaning of Section 2(5) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. In addition, Respondent must also make Mario Franco, Rosa Franco, Pilar Mestanza, and Milagros Vasquez whole for any loss of earnings and other benefits incurred as a result of Respondent's failure to recall them back to work. Backpay shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB 6 (2010). In accordance with *King Soopers, Inc.*, 364 NLRB No. 93 (2016), enfd. in relevant part 859 F.3d 23 (D.C. Cir. 2017), the Respondent shall also compensate the employees for their reasonable search-for work and interim employment expenses, if any, regardless of whether those expenses exceed interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons,* supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.

Additionally the Respondent shall compensate Mario Franco, Rosa Franco, Pilar Mestanza, and Milagros Vasquez for the adverse tax consequences, if any, of receiving lump-sum backpay awards, in accordance with *Tortillas Don Chavas*, 361 NLRB 101 (2014), and file with the Regional Director for Region 1, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year for each affected employee in accordance with *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016). The Regional Director will then assume responsibility for transmission of the report to the Social Security Administration at the appropriate time and in the appropriate manner. In addition, pursuant to *Cascades Containerboard Packaging*, 370 NLRB No. 76 (2021), the Respondent will file with the Regional Director for Region 1 a copy of each backpay recipient's corresponding W-2 form(s) reflecting the backpay award.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[46]

[46] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, Michell Enterprises, LLC d/b/a McDonald's, Darien, Connecticut , its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing to recall laid off employees Mario Franco, Rosa Franco, Pilar Mestanza, and Milagros Vasquez because of their union support and other protected activities.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, offer Mario Franco, Rosa Franco, Pilar Mestanza, and Milagros Vasquez full reinstatement to their former jobs, or, if those jobs credibly no longer exists, to a substantially equivalent position, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Mario Franco, Rosa Franco, Pilar Mestanza, and Milagros Vasquez whole for any loss of earnings and other benefits suffered, and search-for-work and interim employment expenses incurred, as a result of the discrimination against them, in the manner set forth in the remedy section of this decision.

(c) Compensate Mario Franco, Rosa Franco, Pilar Mestanza, and Milagros Vasquez for the adverse tax consequences, if any, of receiving lump-sum backpay awards.

(d) Within 21 days of the date the amount of backpay is fixed either by agreement or Board order, or such additional time as the Regional Director may allow for good cause shown, file with the Regional Director for Region 1 a copy of a report allocating the backpay awards to the appropriate calendar years for each affected employee.

(e) File with the Regional Director for Region 1 a copy of each backpay recipient's corresponding W-2 forms reflecting the backpay award.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its facility in Darien, Connecticut copies of the attached notice marked "Appendix."[47] Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 24, 2020.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., December 30, 2021.

Donna N. Dawson
Administrative Law Judge

47 If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT fail to recall laid off employees Mario Franco, Rosa Franco, Pilar Mestanza, and Milagros Vasquez because of their union support and other protected activities.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Mario Franco, Rosa Franco, Pilar Mestanza, and Milagros Vasquez full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Mario Franco, Rosa Franco, Pilar Mestanza, and Milagros Vasquez whole for any loss of earnings and other benefits suffered, and search-for-work and interim employment expenses incurred, as a result our decision not to recall them from layoff, and WE WILL make them whole for any reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate Mario Franco, Rosa Franco, Pilar Mestanza, and Milagros Vasquez for the adverse tax consequences, if any, as a result of receiving lump-sum backpay awards.

WE WILL file with the Regional Director for Region 1, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each affected employee.

WE WILL file with the Regional Director for Region 5 a copy of each affected employee's corresponding W-2 form(s) reflecting the backpay award.

WE WILL file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters.

MICHELL ENTERPRISES, LLC D/B/A MCDONALD'S
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov

10 Causeway Street, Room 601, Boston, MA 02222-1001
(617) 565-6700
Hours: 8:30 a.m. to 5:00 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/01-CA-261495 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER (857) 317-7816.